87-513

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MANVILLE FOREST PRODUCTS CORPORATION,
Petitioner,

vs.

MELVIN EVANS, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

C. A. Martin, III
(Counsel of Record)
SHOTWELL, BROWN & SPERRY
Seventh Floor, Ouachita
National Bank Building
Monroe, Louisiana 71210
Telephone: (318) 388-4700

Of Counsel:
Lawrence S. Falter
Assistant Corporate
Counsel
MANVILLE
CORPORATION
P.O. Box 5108
Denver, Colorado

Peyton Lacy, Jr.
LANGE, SIMPSON,
ROBINSON &
SOMERVILLE
1700 First Alabama Bank Bldg.
BIRMINGHAM, ALABAMA 35203
Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Whether federal labor law and policy under Section 301 of the Labor Management Relations Act exerts pre-emptive force over an action under a Louisiana wage payment statute brought by union employees against their employer for failure to pay vacation benefits to which they are allegedly entitled under a collective bargaining agreement where the state court finds (a) that the employees filed suit in state court despite the fact that they attempted "no recourse to the grievance procedure;" and (b) that under the agreement, the employees "have no right to vacation wages."

2. Whether an action claiming vacation benefits "under the terms of the Collective Bargaining Agreement" is governed by a state statute of limitations for past due wages or is a suit under Section 301 of the Labor Management Relations Act and thus governed by the statute of limitations at Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b).

RULE 28.1 STATEMENT

Manville Forest Products Corporation is a wholly owned subsidiary of Manville Corporation. Its affiliate companies are European Overseas Corporation, Glaswerk Schuller G.m.b.H. (Germany), Holophane Europe Limited (United Kingdom), Holophane International Corporation, International Manville Corporation, Johns-Manville Corporation, Manville de France S.A. (France), Manville Deutscheland G.m.b.H. (Germany), Manville Espanola S.A. (Spain), Manville Europe Corporation, Manville (Great Britain) LTD. (United Kingdom), Manville h.f. (Iceland), Manville Investment Corporation, Manville Italiana S.p.A. (Italy), Manville Japan LTD. (Japan), Manville Mexicana S.A. de C.V. (Mexico), Manville Productos Florestais LTDA. (Brazil), and New Materials, Inc.

Respondents in this matter are Melvin Evans, James C. Arrant, Doris M. Aulds, Nolan A. Blood, Ira A. Brown, William S. Brunson, George L. Canfield, Tommy Christy, Edward R. Corley, Elisha Dawson, Jr., Vaudie Lee Foster, Billy L. Freeland, Simmie L. Heisler, Richard E. Hare, Burrell R. Newman, Kenneth D. Sawyer, Charles W. Walker, Jimmy J. Wilson, Mable E. Winbourne, J. P. Wyatt, Kenneth L. Bryan, Vernon C. King, and Ishmael E. Stuckey.

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IN THE

Supreme Court of the United States

October Term, 1987

MANVILLE FOREST PRODUCTS CORPORATION
Petitioner,

vs.

MELVIN EVANS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT STATE OF LOUISIANA

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal, Second Circuit, State of Louisiana entered on April 1, 1987, and made final by the Supreme Court of Louisiana by denial of an application for a writ of certiorari dated July 1, 1987.

OPINIONS BELOW

The decision of the Supreme Court of the State of Louisiana is unreported, and is reproduced in Appendix A, *infra,* A-1. The Opinion of the Court of Appeal, Second

Circuit, State of Louisiana (hereinafter the "Louisiana Second Circuit"), is published at 505 So.2d 924, and is reproduced in Appendix B, *infra*, A-2 - A-14.

JURISDICTION

The decision of the Louisiana Second Circuit became final on July 1, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOKED

Section 301 of the Labor Management Relations Act (61 Stat. 156, 29 U.S.C. § 185) provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 10(b) of the National Labor Relations Act (49 Stat. 453, 29 U.S.C. § 160(b)) provides in pertinent part as follows:

> *Provided* ... no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, ...

STATEMENT OF THE CASE

Manville Forest Products Corp. ("MFPC") and United Paperworkers International Union, AFL-CIO, Local No. 654 ("UPIU") were parties to a labor agreement (the "contract" or the "labor agreement") covering a unit of hourly employees at MFPC's paper converting facilities in West Monroe, Louisiana effective from November 1, 1980 through October 31, 1984. This action was commenced by plaintiff employees in the Fourth Judicial District Court, Parish of Ouachita, State of Louiaiana, on February 23, 1982 for vacation pay to which they alleged entitlement under the contract. The suit resulted from MFPC's August 14, 1981 announcement that it was closing Plant Forty-Five (45) where plaintiffs were employed, and that plaintiffs' employment was terminated. Plaintiffs filed no grievance but brought their state court petition on February 23, 1982 for breach of contract and, at paragraph three, alleged as follows:

> *Under the terms of the Collective Bargaining Agreement* in force between Petitioners' Union, Ouachita Local Number 654 of the United Paper Workers International Union and Defendant, which agreement was in full force and effect at all times pertinent herein, *Petitioners are entitled to vacation pay* from defendant. Petitioners were all members of the said Union at all times pertinent hereto and *Petitioners are all entitled to the benefits of said Collective Bargaining Agreement.* (Emphasis added; Appendix E, A-26).

Additionally, plaintiffs alleged in paragraph four that they were not paid the vacation pay within three (3) days of

demand thereof and were entitled to penalties and attorney's fees under *La. R.S.* 23:631, *et seq.*, particularly *La. R.S.* 23:640.

The labor agreement contained a vacation pay eligibility clause which provided certain terms for vacation "entitlement" (Appendix F, A-44). Thereunder, no employee is "entitled" to vacation or vacation pay unless they "on January 1 of any year have been continuously employed for one (1) or more years ..." and, for purposes of vacation benefits, "continuous service shall be broken in the event of: 1. discharge ..." (Appendix F, A-48). The contract also provides that "[a]ny dispute or grievance arising out of the interpretation or application of the terms of this agreement shall be settled in accordance with the grievance steps hereinafter set forth ..." (Appendix F, A-37). The final step in this procedure is arbitration and the contract provides the arbitrator's award "shall be final and binding upon the company, the International Union, the Local Union and the employees involved ..." (Appendix F, A-42). At Article XXIV, the contract provides that "[a]ny Federal or State Law ... or any conclusive interpretation thereof, which may conflict with any provision of this Agreement, shall void only such provisions and shall not affect any other provision ..." (Appendix F, A-49).

A. Proceedings in the Trial Court

The parties agreed at trial that the labor agreement governed the vacation pay entitlement of the plaintiffs. MFPC contended that the suit was one for breach of a labor agreement and, as such, was brought under and governed by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (hereafter "Section 301"). The case was initially dismissed by the trial court on MFPC's

motion based on failure of plaintiffs to exhaust their grievance rights under the contract but was reinstated on grounds that the court "wrongfully considered the entire bargaining agreement in arriving at its original decision...." MFPC's subsequent motions to dismiss for failure to exhaust the grievance procedure and for failure to meet the applicable statute of limitations were denied by the trial court.

After a bench trial, the trial court found plaintiffs sought "accrued vacation pay under the collective bargaining agreement and under *La. R.S.* 23:631, *et seq.*" and concluded that plaintiffs were due the vacation pay "accrued" at the time of plant closing (Appendix C, A-15). At all times prior to appeal, all salient issues were treated by the trial court as arising under Section 301 and being based on breach of a labor agreement.

B. Decision of the State Court of Appeals

Upon appeal by MFPC to the Court of Appeals, Second Circuit, State of Louisiana, the decision of the trial court was affirmed but a different rationale was stated. The Louisiana Second Circuit found the Louisiana wage payment statute was controlling rather than Section 301 and the labor agreement.

The appellate court held that the contractual grievance-arbitration procedure was inapplicable to the dispute, thereby extinguishing any obligation that plaintiffs exhaust that procedure. The court found that the state statute established "the right to be paid promptly upon discharge" and that *La. R.S.* 23:632 "authorizes private lawsuit" to collect vacation pay. The court concluded that

"[b]ecause the conflicting statute takes precedence over part of the agreement, this suit was authorized without prior recourse to the grievance procedure". (Appendix B, A-9 - A-11).

The appellate court further concluded that in regard to vacation pay entitlement, there was "a direct conflict between our statutes and the terms of the Agreement". (Appendix B, A-8). The court went on to hold that because the parties had contracted that conflicts between the contract and "[a]ny Federal or State law ..." would void only the conflicting provision of the contract that "the Agreement yields to any conflicting state law...." (Appendix B, A-8). Thus, it held that vacation pay entitlement was established by State law, not by the contract and that the contractual requirement that plaintiffs be employed on January 1 of the succeeding year in order to earn or be entitled to vacation pay "conflicted" with *La. R.S.* 23:634. The court also held that because the action was "based on a private suit to enforce a right under state law," the six month statute of limitations at Section 10(b) of the National Labor Relations Act was not applicable to bar the suit and that a three year state statute of limitations controlled (Appendix B, A-12).

C. The Louisiana Supreme Court Decision and Finality

MFPC sought writs of certiorari to the Supreme Court of Louisiana. On July 1, 1987, these writs were denied without comment (Appendix A, A-1). The decision

of the Louisiana Second Circuit is final for the purposes of 28 U.S.C. § 1257(3).[1]

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Louisiana Court is in Direct Conflict With the Decisions of This Court Defining the Constitutional Principle of Federal Pre-emption in Suits Based on Breach of a Collective Bargaining Agreement.

The Louisiana Second Circuit's decision seriously intrudes upon and erodes both the federal cause of action under Section 301 and the national labor policy establishing the use of arbitration as the exclusive method for the resolution of labor disputes. The Louisiana Second Circuit here holds that a state cause of action under the state "wage payment statute" at *La. R.S.* 23:631, *et seq.* is superior to the federal cause of action for breach of labor contracts created by Congress at Section 301. The Louisiana Second Circuit rules the substantive terms of the labor agreement were subordinate to a state law which, according to the court's opinion, reveals a "legislative intent" to confer on Louisiana workers "the right to be paid promptly upon discharge" (Appendix B, A-10). This decision blithely undermines thirty years of precedent establishing and defining federal substantive law begun by this court's admonition that "[a]ny state law applied [to inter-

[1] Despite the denial of stay of judgment by this Court and the Supreme Court of Louisiana, and the subsequent payment of the judgment to the plaintiffs, MFPC is seeking writs because of its belief that the interpretation of the Louisiana wage payment statute seriously violates and intrudes upon established federal substantive law under Section 301.

pret a labor agreement] will be absorbed as federal law and will not be an independent source of private rights." *Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448, 457 (1957).

Research reveals that forty-six of the fifty states, Puerto Rico and the District of Columbia have some type of statute which, like *La. R.S.* 23:631, *et seq.*, requires mandatory payment of wages and benefits to which terminated workers are entitled (Appendix G, A-51). Several of these statutes specifically include vacation benefits within the definition of wages and, typically, the common law definition of "wages" includes earned or accrued vacation pay as a portion of the *quantum meruit* to which a worker is entitled upon termination.

The decision of the Louisiana Second Circuit in this case elevates its state wage payment statute to a position of superiority over federal substantive law developed under Section 301 to govern the interpretation and enforcement of labor agreements. Specifically, the Louisiana Second Circuit utilizes state law to abrogate federal substantive law in two particulars. First, the court holds that suit may be maintained regardless of the agreement of the parties to subject controversies over entitlement to vacation pay to the final and binding process of arbitration. Second, the court holds that the state rather than federal law will control in determining whether or not vacation benefits are in fact entitled, earned or accrued, albeit that the requirements for entitlement have been bargained and the terms of the bargain contracted for are in a labor agreement. Absent review by this court, the decision of the Louisiana Second Circuit will encourage state court suits under wage payment statutes to usurp the well-developed federal principles of pre-emption and exhaustion of contract remedies.

It is well-settled in suits under a labor agreement that "[i]ncompatible doctrines of local law must give way to principles of federal labor law." *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Company,* 369 U.S. 95, 102-103 (1962). The reason for this doctrine is that the "possibility that individual contract terms might have different meaning under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration" of labor agreements. *Id.,* p. 103. "If the state ... law purports to define the meaning of the contract relationship, that law is pre-empted." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 213 (1985). The Louisiana Second Circuit used *La. R.S.* 23:631 specifically to thwart arbitration and to determine vacation entitlement under state law to the exclusion of the contract terms. "[F]ederal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure ..." *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652 (1965). The Louisiana Second Circuit holds that the state wage payment statute establishes "certain basic rights [to vacation pay which] may be asserted *outside* the grievance procedure" (Emphasis added, Appendix B, A-11). This holding directly conflicts with the basic tenants of preemption and exhaustion enunciated by this court. The Louisiana Second Circuit ignored the clear mandate of this Court that "[a]n action arising under § 301 is controlled by federal substantive law even though it is brought in a state court." *Avco Corp. v. Aero Lodge, I.A.M. & A. W.,* 390 U.S. 557, 559 (1968).

A congressional policy favoring the private resolution of grievances is set forth in the National Labor Relations Act at 29 U.S.C. § 173(d). This policy "can be effectuated only if the means chosen by the parties for set-

tlement of their differences under a collective bargaining agreement is given full play." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976), citing *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

The case at hand is a traditional action for breach of a labor contract under Section 301. Although the Louisiana statute is mentioned in paragraph four of the petition as a basis for seeking penalties and fees, paragraph three, the gravamen of the petition, pleads a breach of contract. [2]

Since this Court's 1965 decision in *Republic Steel Corp. v. Maddox, id.*, it is uniformly held that disputes over pay issues under labor contracts cannot be litigated in state or federal court under Section 301 unless adherence to any final and binding grievance procedure is sought by the employee-plaintiff. [3] Ignoring this uniform rule, the Louisiana Second Circuit found a "conflict" between the grievance procedure and the state cause of action under

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[2] Even where the state suit is in tort, not contract, "[i]nasmuch as federal law *must* control the uniform meaning given to contract terms in a collective bargaining agreement ..., [a] state-tort action that necessarily rests on an interpretation of those terms is pre-empted by § 301." (Emphasis added). *IBEW, AFL-CIO v. Hechler*, 481 U.S. ____, 95 L.Ed.2d 791, 801, 107 S.Ct. 2161, 2166 (1987), citing *Allis-Chalmers Corp. v. Lueck, id.* at 218-219.

[3] Both state and federal courts dismiss suits for breach of labor contracts for "failure to exhaust" the grievance remedies. See, *e.g.*, *Strachan v. Union Oil Co.*,768 F.2d 703 (5th Cir. 1985); *Bates v. Foremost McKesson, Inc.*, 392 So.2d 389(La. 1980).

La. R.S. 23:632 based solely on the existence of the state cause of action.[4] The mere availability of a state cause of action, however, does not create a "conflict" which allows the federal substantive law to be ignored. *E.g. Avco Corp. v. Aero Lodge, I.A.M. & A.W., id.*

The Louisiana Second Circuit finds the vacation entitlement provisions of the labor agreement "conflict" with *La. R.S.* 23:634. There is no "conflict" because the Louisiana law sets out no vacation entitlement criteria, but merely requires vacation "actually earned" not be withheld.[5] But, assuming one, the pre-emptive force of Section 301 requires that federal law control the result of any such conflict. The "conflict" here is between *La. R.S.* 23:631, *et*

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[4] The court cites *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), as authority for the proposition that "a statute enacted to provide minimum substantive guarantees to individual workers may supersede collective bargaining agreements." That case is inapposite to the case here as it involved a conflict between two federal statutes, the Fair Labor Standards Act and Section 301. Further, even if this significant difference is ignored, the Louisiana Statute is held by the Louisiana court to show a "legislative intent to confer on workers ... the right to be paid promptly on discharge." The Louisiana statute does not, and does not purport to establish "minimum substantive quantities" for vacation entitlement.

[5] That statute, however, even if applicable, prohibits only forfeiture of wages or benefits "actually earned up to the time of ... discharge." When plaintiffs were discharged on August 14, 1981, they had not "actually earned" a vacation benefit because their continuous service had not lasted until January 1, 1982.

seq. and Section 301.[6] In a similar conflict between the Federal Arbitration Act and a state wage payment law, this Court recently held that "under the Supremacy Clause, the state statute must give way." *Perry v. Thomas,* 482 U.S. ____, 96 L.Ed.2d 426, 436, 107 S.Ct. ____ (1987). "Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the state." *Local 24, Teamsters, Chauffeurs & Warehousemen v. Oliver,* 350 U.S. 283, 296 (1959).

The Louisiana Second Circuit's decision cuts an impermissible incision in the fabric of established federal pre-emption. Because of the prevalence of similar state wage payment statutes, the Louisiana Second Circuit's decision will foster attempts to apply state substantive law under wage payment statutes to supplant collectively bargained for wage and vacation pay plans, an area reserved by Section 301 to federal substantive law. The Louisiana Second Circuit's decision intrudes upon the policy of industrial self-government which flows from the

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[6] The Louisiana Second Circuit cites the "severability" clause at Article XXIV which nullifies only contract provisions which conflict with "Federal or State Law." Because federal law requires both that a labor contract be first subject to interpretation in arbitration, and that Federal substantive law overrides State law, federal law "conflicts with," and thus nullifies, the selective reading of Article XXIV, engaged in by the Louisiana Second Circuit, which would make state law superior. A clause in a labor contract providing it be governed by state law is "meaningless" under federal law because to give it effect is contrary to "sound principles of contract construction and to the national labor policy." *Carey v. General Electric Co.*, 213 F. Supp. 276, 281, n.6 (S.D.N.Y. 1962), *rev'd on other grounds,* 315 F.2d 499 (2nd Cir. 1963), *cert. denied* 377 U.S. 908 (1964).

collective bargaining process by allowing direct access to the state courts on a dispute arising directly from the provisions of the collective bargaining agreement.

The Louisiana Second Circuit's decision is in direct conflict with the important and well developed federal preemption doctrine as defined by this Court over the past thirty years.

II.

The Louisiana Second Circuit's Decision is in Conflict With a Decision of the United States Court of Appeals for the Seventh Circuit Interpreting a Similar State Statute.

In *National Metalcrafters v. McNeil,* 784 F.2d 817 (7th Cir. 1986), *cert. denied,* 479 U.S. ____, 93 L.Ed.2d 356, 107 S.Ct. 403 (1986), the court was faced with the task of interpreting an Illinois statute which, like the Louisiana statute, requires payment of "earned" vacation (and other) pay. The United States Court of Appeals for the Seventh Circuit held that application of the Illinois Statute was pre-empted by Section 301 in a dispute over whether or not striking employees who were arguably covered by the labor contract were entitled to vacation pay.

In this case, as in *National Metalcrafters,* the company interpreted the labor agreement as not "entitling" plaintiffs to vacation pay. The Louisiana court, in fact, held that "a careful reading" of the labor agreement affirmed that thereunder "the plaintiffs have no right to vacation pay" because the labor agreement in this case clearly provides that only those employees who "on

January 1 of any year have been continuously employed" are "entitled to vacation with pay ..." (Appendix F, A-44). The plaintiffs never became entitled to (earned) vacation pay for the year 1981 under the terms of the controlling labor agreement just as the strikers in *National Metalcrafters* were arguably not entitled to vacation pay under the contract there.

The Seventh Circuit held in *National Metalcrafters* that the function of interpreting labor agreements should be performed under the substantive federal law and not by the district court under state law. In both cases the dispute is over whether or not certain employees are entitled to vacation pay under a labor agreement. That dispute must be resolved by application of principles of federal substantive law, including the principle of exhaustion, which required the issue be first subjected to arbitration.

The Louisiana statute, like the Illinois law, lays no ground rules for determining whether or not vacation is "actually earned." It only requires payment if, after examining the remaining facts, including the labor agreement, a finding of actual earning is made. Here, as in *National Metalcrafters, id.* at 828, "[t]he problem ... is that the wage payment act does not require any terms in the ... contract ... [but] just requires the employer to stick to the terms it has negotiated with the employee or the employee's bargaining representative."

The Louisiana Second Circuit impermissibly utilized the wage payment statute to substitute a state cause of action for enforcement of rights established by a labor agreement for the federal cause of action under Section 301. The state court failed to resolve the case under

"federal substantive law," including the principles of pre-emption and exhaustion.

The Seventh Circuit correctly applied pre-emption in *National Metalcrafters*. According to the Louisiana Second Circuit's decision, however, the provisions of state wage payment statutes may be interpreted in various ways to resolve disputes over vacation pay entitlement despite the provisions of a governing collective bargaining agreement. The uniformity and stability of labor contract interpretation is endangered by the Louisiana Second Circuit's decision.

III.

The Statute of Limitations Holding Presents a Serious Federal Question in Derogation of the Decisions of This Court.

The plaintiffs' petition here clearly sounded in breach of contract and was brought as a "suit for violation of a [contract] between an employer and a labor organization ..." 29 U.S.C. § 185(a). If the Louisiana Second Circuit had jurisdiction to and properly interpreted the labor agreement, regardless of the pre-emption and exhaustion requirements, it yet erred in refusing to apply the six month statute of limitations at Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). This Court unequivocably held that the six month statute of limitations is applicable to suits alleging breach of a collective bargaining agreement against an employer based on a corresponding failure by the union to successfully or fairly

vindicate these claimed rights. *DelCostello v. Teamsters,* 462 U.S. 151 (1983);[7] *see West v. Conrail,* 481 U.S. ____, 95 L.Ed.2d 32, 107 S.Ct. 1538 (1987).

The Louisiana Second Circuit held the Section 10(b) period to be improper on the basis that "[t]he instant suit is not an NLRB 'complaint' or citation, but rather a private lawsuit to enforce a right, established by state law ..." (Appendix B, A-12). Plaintiff's breach of contract suit is clearly a hybrid §301/fair representation suit and, because it was found as a matter of fact to have been filed over six months from the August 14, 1981 notification to employees of MFPC's refusal to pay vacation benefits, is time-barred. The application of Louisiana's three year limitation period without mention of *DelCostello* is violative of federal law and national labor policy.

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[7] Whether both the union and company are sued or whether one is sued and not the other, the claim is classified as "a hybrid § 301/fair representation claim ..." *Id.*, P. 165, citing *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 66 (1983).

CONCLUSION

For the foregoing reasons, this Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

C. A. Martin, III
(Counsel of Record)
SHOTWELL, BROWN
& SPERRY
Seventh Floor, Ouachita
National Bank Building
Monroe, Louisiana 71210
Telephone: (318) 388-4700

Peyton Lacy, Jr.
LANGE, SIMPSON,
ROBINSON &
SOMERVILLE
1700 First Alabama Bank
Bldg.
Birmingham, Alabama 35203
Telephone: (205) 250-5036

Of Counsel:

Lawrence S. Falter
Assistant Corporate Counsel
MANVILLE CORPORATION
P.O. Box 5108
Denver, Colorado 80217-5108

APPENDIX

APPENDIX A

THE SUPREME COURT
OF THE
STATE OF LOUISIANA

MELVIN EVANS, et al
VS. NO. 87-C - 1227
MANVILLE FOREST PRODUCTS CORPORATION

- - - - - - -

IN RE: Manville Forest Prod. Corp.; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 18609-CA; Parish of Ouachita 4th Judicial District Court Div. "E" Number 82-590

- - - - - - -

July 1, 1987
Denied.

PFC
JAD
WFM
JLD
JCW
LFC

Supreme Court of Louisiana
July 1, 1987

/s/Frans J. Lebranche, Jr.
Clerk of Court
For the Court

APPENDIX B

NO. 18,609-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

****

MELVIN EVANS, ET AL — Appellee

versus

MANVILLE PRODUCTS CORPORATION — Appellant

****

Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana

****

BRUSCATO, LOOMIS & STREET
by: C. Daniel Street — Attorneys for Appellee

SHOTWELL, BROWN & SPERRY
by: C. A. Martin, III — Attorneys for Appellant

****

[Dated April 1, 1987]

Before Hall, Jasper Jones and NORRIS, JJ.

NORRIS, Judge

The plaintiffs, 23 former employees of the Manville Forest Products Corp. ("Manville") Specialty Bag Plant in West Monroe, sued Manville for vacation wages they were allegedly owed when Manville closed the plant in August 1981. Manville's defense was that the plaintiffs had not followed the grievance procedure contracted in the collective bargaining agreement ("Agreement") between Manville, its employees and their Union, United Paperworkers Union, AFL-CIO, Local No. 654 ("Union"). The trial court denied Manville's peremptory exceptions and motion for summary judgment; after a bench trial, it granted judgment in favor of plaintiffs for the vacation wages due, legal interest and attorneys fees. Manville has appealed suspensively, raising three issues:

> (1) Whether the plaintiffs' cause of action is barred for failure to exhaust their contractual remedies under the Agreement;
>
> (2) Whether the plaintiffs' cause of action has prescribed under the six-month prescriptive period of § 10(b) of the National Labor Relations Act, as amended; and
>
> (3) Whether the plaintiffs are entitled to vacation wage benefits under the terms of the Agreement.

Because none of these arguments presents reversible error, we affirm the trial court's judgment.

FACTS

Manville decided to close its Specialty Bag Plant, known as Plant No. 45, in the summer of 1981. Citing poor economic conditions, Manville officials met with Union representative in late July and early August to discuss the possibility of saving some jobs by merging Plant 45 with another plant, but these negotiations were unsuccessful. Therefore when Manville posted notices in the plant on August 13 and 14, 1981, workers were informed that the closure was permanent and irrevocable, without any possibility of recall or assertion of seniority rights.[1] The notices also advised employees that severance pay would be disbursed in a lump sum. On the subject critical to this lawsuit, the notices informed employees that accumulated vacation pay would be given to those who were eligible for early retirement; it did not specify a policy for other employees.[2] The plant was formally closed at the end of August. The machinery was sold and removed from the premises. The employees simultaneously lost their Union membership because they no longer worked in the industry and because their dues, previously paid through salary deductions, lapsed.

---

[1] Three maintenance employees and one electrician were allowed to exercise seniority at the other plants in accordance with a supplemental agreement. All other employees, including the plaintiffs, lost their seniority.

[2] The notice provided as follows:

> Employees will be entitled to receive vacation pay for any unused vacation that they are entitled to use in 1981. Those employees who are eligible for early or normal retirement and who qualify with the required 1040 hours will receive vacation pay accumulated in 1981.

In September 1981, the plaintiffs and some other former employees filed a grievance over the loss of seniority rights. Their objective was reinstatement with seniority at other Manville plants. The aggrievants pursued the grievance procedure provided in the Agreement except that this particular grievance was started directly at the third step, where it was denied. The Union then received the grievance and, in accordance with its by-laws, submitted it to a vote at two consecutive meetings. The aggrievants were not allowed to vote at these meetings because they were no longer Union members. The voting members elected not to send the seniority grievance to arbitration.

The plaintiffs did not present a grievance over the vacation wages because if they had succeeded on the seniority issue, they would have been reinstated to employment and collected the wages in the usual fashion. Further, according to standard company procedures, vacation wages were never paid until the January after the year in which they accrued. Therefore in January 1982 the plaintiffs requested from Manville their vacation wages for the year 1981. They had already received their vacation wages for 1980. Manville denied the request, citing language in the Agreement that allegedly disqualified employees from collecting vacation pay unless they had been continuously employed for one year on January 1, 1982. Plaintiffs sent Manville a demand letter on February 15 and filed suit on February 23, 1982.

Manville initially filed exceptions of no cause and no right of action, which the trial court eventually overruled. The case was then stayed pending Manville's bankruptcy reorganization. After the stay was lifted, the case was returned to state district court, which denied Manville's

subsequent motion for summary judgment and its exception of prescription. After a trial on February 6, 1986, the court entered judgment granting plaintiffs' demands[3] for vacation wages with interest from date of judicial demand, and attorney fees of $4,500. Manville has appealed suspensively.

In order to resolve the issues we have had to look at the nature of the right of the plaintiffs asserted and at the appropriate provisions of the Agreement. We will therefore consider the arguments in a different sequence from that presented in Manville's brief.

ARGUMENT NO. 3

In its third argument, Manville contends that under the terms of Art. XVII of the Agreement, the plaintiffs have no right to vacation wages. A careful reading of the Agreement will bear this out. Art. XVII, Sec. 1, provides in part:

> All employees who on January 1 of any year have been continuously employeed for one (1) or more years shall be entitled to vacation with pay subject to the provisions set forth in this Article; however, in order to be eligible for a vacation *** an employee must have completed at least ten hundred forty (1040) hours of work during the previous calendar year or during the twelve (12) month period prior to his or her scheduled vacation.

---

[3] One plaintiff was voluntarily dismissed because he did not meet the 1040 hour requirement of Art. XVII, Sec. 1.

Article XVII, Sec. 3(d) further provides, in part:

> *** For the purpose of determining vacation benefits, an employee's continuous service shall be broken in the event of: (1) discharge [.]

Under these provisions, if an employee was disarged on August 30, 1981, then he did not have one year's continuous employment on January 1, 1982, when the vacation wages would otherwise accrue, and would be therefore disqualified from getting those wages.

The plaintiffs contend, however, that under state law, this arrangement is invalid. LSA-R.S. 23:631 requires an employer to pay any discharged employee the amount of wages then due, within three days of discharge. Further, R.S. 23:634 prohibits contractual agreements whereby employees shall forfeit their wages if they are discharged before the contract is completed. Under this statute, discharged employees are entitled to collect the wages actually earned up to the time of discharge. The jurisprudence holds that vacation wages are additional wages and subject to the requirements of these statutes. *Draughn v. Mart*, 411 So.2d 1188 (La. App. 4th Cir. 1982), writ denied 415 So.2d 944 (La. 1982); *Lee v. K & B Corp.*, 479 So.2d 459 (La. App. 1st Cir. 1985). Moreover, R. S. 23:640 specifically addresses the situation in which the employment is regulated by a collective bargaining agreement. It provides that vacation benefits, conferred by agreement, shall be treated as wages and subject to the same provisions as to payment and collection from employers as wages under R.S. 23:631-639. These statutes, of course, entitled a discharged employee to a swift settlement of all wages.

We are therefore faced with a direct conflict between our statutes and the terms of the Agreement. Here, as always, the contract is the law between the parties. LSA-C.C. art. 1983. The Agreement specifically addresses the issue of conflict between its provisions and a state or federal law. Art. XXIV provides:

> Any Federal or State law, Federal or State Regulation, or any conclusive judicial interpretation thereof which may conflict with any provisions of this Agreement, shall void only such provisions and not affect any other provision of this Agreement.

Under this Article, the Agreement yields to any conflicting state laws. Art. XVII of the Agreement, providing for forfeiture of vacation wages, obviously conflicts with LSA-R.S. 23:631 et seq., which prohibit such forfeiture. Under Art. XXIV, the statutes supersede the conflicting provisions of the Agreement.

We note that the plaintiffs have met every other requirement of the Agreement for receiving vacation wages; these provisions remain intact. The forfeiture provisions, however, cannot be honored, regardless of the precise language of the Agreement. Thus the third argument lacks merit.

ARGUMENT NO. 1

By this, its most expansive argument, Manville contends that the grievance procedure of Art. VIII of the Agreement was the exclusive means of settling the dispute; since the plaintiffs did not pursue it, Manville claims,

their suit is barred. Manville cogently argues that federal law and jurisprudence favor extrajudicial settlement of grievances. 29 U.S.C. § 173(d); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). Manville concedes that in some situations, the grievance process may be sidestepped, as in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), and in *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984), but that the instant case does not present any of these situations.

The plaintiffs contend that they were entitled to forego the grievance procedure because it is geared to settling disputes in the workplace, whereas the collection of past due wages is not a dispute in the workplace and not traditionally associated with a grievance process. They also argue that to follow the grievance procedure would have been vain and useless, as illustrated by their experience in pressing the seniority grievance: since they are not Union members, they have no voice in prosecuting the process to arbitration. Cf. *O'Dell v. Int'l Paper Co.*, 280 So.2d 913 (La. 1973).

The proper resolution of this issue, as the previous issue, hinges on Art. XXIV of the Agreement. This Article provides that portions of the Agreement that conflict with state law will yield to state law. R.S. 23:640 provides that employees whose employment is regulated by a collective bargaining agreement shall pursue their claims for vacation wages "in the same manner and subject to *** the same provisions as to collection and enforcement" as apply to ordinary wages under R.S. 23:631-639. One of these statutes, R.S. 23:632, specifically authorized private lawsuit as the means of collecting wages and enforcing the wage laws. This is in direct conflict with Art. VIII of the

Agreement, which establishes a procedure for resolving any "dispute or grievance arising out of the interpretation or application of the terms of [the] Agreement[.]" Because the conflicting statute takes precedent over part of the agreement, this suit was authorized without prior recourse to the grievance procedure.

We are naturally sensitive to the strong federal policy, ably argued by Manville in brief, in favor of extra-judicial settlement of grievances. In fact, this policy would seem to destroy the plaintiffs' cause of action in the instant suit. However, the Supreme Court has recently recognized that a statute enacted to provide minimum substantive guarantees to individual workers may supersede collective bargaining agreements. At issue in *Barrantine*, supra, was the statute that guarantees a minimum wage, 29 U.S.C. § 206. The Court said:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

450 U.S. at 737, 101 S.Ct. at 1443, 67 L.Ed.2d at 651.

We agree that LSA-R.S. 23:631, 634 and 640 show legislative intent to confer on workers, regardless of contrary arrangements, the right to be paid promptly upon dis-

charge. See *Johnson v. Continental Slip Form Bldrs.*, 449 So.2d 56 (La. App. 5th Cir. 1984).

Given the Supreme Court's acknowledgement in *Barrantine* that certain basic rights may be asserted outside the grievance procedure, the positive recognition in Art. XXIV of the Agreement that state statutes will supersede conflicting provisions, and the plain intent of R.S. 23:631 et seq. to confer certain basic rights, we conclude that this lawsuit was properly brought. The plaintiffs were not required to follow the grievance procedure. This argument lacks merit.

ARGUMENT NO. 2

By this argument, Manville contends that the suit should have been barred because it was not filed within the six-month prescriptive period allegedly imposed by § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). The Agreement itself does not specify any time limit for an action to collect vacation pay.[4] Plaintiffs contend that the case should be governed by LSA-C.C. art. 3494, which sets a limit of three years on any "action for the recovery of compensation for services rendered, including payment of salaries [and] wages[.]"

---

[4] Art. VIII, Sec. (a)1 provides that an aggrieved employee must present his oral complaint to his immediate supervisor within five days of the act or omission that gave rise to the grievance. Manville has not argued that this is a period of limitations, and we would not be inclined to hold to it so when the relief sought is more particularly governed by the Civil Code.

We have closely examined the text of the federal statute. It provides, in part:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect *** Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made[.]

A plain reading of this statute shows that it contemplates a "complaint" issued by the National Labor Relations Board, a federal agency, directed to an employer or a union and alleging an unfair labor practice as described by the statute. The instant suit is not an NLRB "complaint" or citation, but rather a private lawsuit to enforce a right, established by state law, in favor of former employees who have no further connection with their employer or union. Moreover, the plaintiffs are not asserting any unfair labor practice as described by the NLRA.[5] Thus

---

[5] Sec. 8(a) of the NLRA makes it an unfair labor practice for an employer --

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights [of self-organization, joint labor orgainzations [sic], bargaining collectively, etc.];
> (2) to dominate or interfere with the formation or admini-

Footnote continued on next page.

it is abundantly clear that this statute is inapplicable to the instant case. See *Carpenters Local v. Pratt-Farnsworth*, 609 F.Supp. 1299 (E.D.-La. 1984).

By contrast, LSA-C.C. art. 3494 fits precisely into the relief sought in this case, payment of past due wages. The prescriptive period provided by this article is therefore appropriate. *Johnson v. Continental Slip Form Bldrs.*, supra; *Carpenters Local v. Pratt-Farnsworth*, 609 F.Supp. 1302 (E.D.-La. 1984). We note the amendment that extended this prescription from one to three years. See LSA-Acts 1983, No. 173. We would be inclined to hold that the amendment is retroactive. See *Lott v. Haley*, 370 So.2d 521 (La. 1979); *Orleans Parish Sch. Bd. v. Pittman Const. Co.*, 261 La. 665, 260 So.2d 661 (1972). However, we need not face this issue. The refusal to pay vacation wages occurred in August 1981; suit was filed on February 23, 1982 and was timely under either prescriptive period. This argument lacks merit.

For these reasons, the judgment appealed from is affirmed at Manville's costs.

AFFIRMED.

Footnote continued from previous page.

> stration of any labor organization or contribute financial or other support to it ***;
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ***;
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
> (5) to refuse to bargain collectively with the representatives of his employees ***.

COURT OF APPEAL, SECOND CIRCUIT
STATE OF LOUISIANA
430 Fannin
Shreveport, La. 71101
(318) 227-3700

TO: Mr. C. A. Martin, III
Shotwell, Brown & Sperry
P.O. Box 1591
Monroe, La. 71210

Shreveport, Louisiana, 04/30/87

Docket Number: 18,609 CA

Evans, Melvin et al

vs.

Manville Products Corporation

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by Defendant Appellant has this day been denied.

Comments (if any were given by the Court):

FOR THE COURT
Diana P. Heisler
Clerk of Court

APPENDIX C

STATE OF LOUISIANA

PARISH OF OUACHITA * FOURTH DISTRICT COURT

MELVIN EVANS, ET AL FILED: June 10, 1986

VERSUS NO. 82-590

MANVILLE FOREST PRODUCTS CORPORATION /s/NOEL CULPEPPER DEPUTY CLERK

REASONS FOR JUDGMENT

Plaintiffs bring this lawsuit to recover allegedly accrued vacation pay.

The Court has studied the prior rulings in this case and the legal memoranda submitted by the parties. The Court accepts the arguments advanced by plaintiffs and concludes that this claim is properly before the Court.

The plaintiffs seek their stipulated amounts of accrued vacation pay under the collective bargaining agreement and under the provisions of La. R.S. 23:631 et. seq. The Court concludes that under the terms of the collective bargaining agreement and of R.S. 23:631 et. seq. including R.S. 23:634 the plaintiffs are entitled to their vacation pay accrued at the time of the plant closing in the amounts stipulated to at trial bearing legal interest from date of judicial demand. *Morse v J. Ray McDermott*, 344 So2d 1353 (La. 1976).

Plaintiffs also seek penalty wages and attorneys fees. The jurisprudence of this state is to the effect that statutes which are expressly penal in nature are to be strictly construed. If it is determined that a bona fide dispute as to wages due existed at the time of the refusal to pay, no penalties will be awarded. For the employee to recover, the employer must have been motivated by bad faith or must be found to have acted in an arbitrary or unreasonable manner. *Draughn v. Breaux Mart*, 411 So2d 1188 (La.App. 4th Cir. 1982) writ denied 415 So2d 944 (La. 1982).

The Court finds that this was basically a good faith dispute caused to a large extent by a certain amount of ambiguity in the contract and that the defendant did not act in an unreasonable manner. Penalty wages must therefore be denied. However, since the wages were due and are being recovered the defendant remains liable for reasonable attorney fees. *Draughn, supra.* The Court fixes reasonable attorney fees for the plaintiffs at $4500.00 bearing legal interest from date of judgment. All costs of this proceeding are assessed against the defendant. Judgment will be signed in accordance with these written reasons for judgment upon proper presentation to this Court.

Respectfully submitted,

/s/JOHN R. JOYCE

John R. Joyce, Judge
Division "E"

STATE OF LOUISIANA

PARISH OF OUACHITA * FOURTH DISTRICT COURT

MELVIN EVANS, ET AL FILED: June 26, 1986

VERSUS NO. 82-590

MANVILLE FOREST PRODUCTS CORPORATION /s/Susan W. Jeryl DY. CLK., 4TH DIST. CT

JUDGMENT

This matter came on regularly for trial on the 6th day of February, 1986. Present: C. Daniel Street, attorney for Plaintiffs; C. A. Martin, III, attorney for Defendant. The Court, after hearing the pleadings, evidence, and argument of counsel, and considering the law and the evidence to be in favor of Plaintiffs, for the reasons contained in the Court's "Reasons for Judgment" filed June 10, 1986:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Plaintiffs and against Defendant, in the amounts indicated hereinafter for each named Plaintiff:

JAMES C. ARRANT	$2,047.50
DORIS AULDS	2,065.50
NOLAN A. BLOOD	1,228.50
IRA A. BROWN	1,050.75
WILLIAM S. BRUNSON	2,210.00
GEORGE CANFIELD	1,066.50
TOMMY CHRISTY	2,172.00
EDWARD CORLEY	1,638.00

ELISHA DAWSON, JR.	1,228.50
MELVIN EVANS	2,210.00
VAUDIE LEE FOSTER	2,068.50
BILLY L. FREELAND	700.50
SIMMIE L. HEISLER	2,652.00
RICHARD E. HARE	2,917.50
BURRELL R. NEWMAN	1,190.50
KENNETH O. SAWYER	724.00
CHARLES W. WALKER	2,917.50
JIMMY J. WILSON	1,228.50
MABLE WINBOURNE	2,048.75
J. P. WYATT	2,210.00
KENNETH L. BRYAN	1,228.50
VERNON C. KING	2,457.00
ISHMAEL E. STUCKEY	2,917.50

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant pay legal interest on all said sums from date of judicial demand, until paid, and all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded attorneys fees of $4,500.00 to bear legal interest from date of judgment.

JUDGMENT RENDERED on June 10, 1986;

JUDGMENT SIGNED on this 26th day of June, 1986, in Open Court at Monroe, Louisiana.

/s/John R. Joyce
JUDGE

APPROVED AS TO FORM:

/s/C. Daniel Street
C. DANIEL STREET,
ATTORNEY FOR PLAINTIFFS

/s/C. A. MARTIN, III
C. A. MARTIN, III,
ATTORNEY FOR DEFENDANT

APPENDIX D

STATE OF LOUISIANA

PARISH OF OUACHITA * FOURTH DISTRICT COURT

MELVIN EVANS, ET AL * FILED: September 3, 1985

VERSUS NO. 82-590 *

MANVILLE, FOREST PRO-* /s/NOEL CULPEPPER
DUCTS CORP. DEPUTY CLERK
OF COURT

*

RULING ON EXCEPTION OF PRESCRIPTION

Defendant seeks to end this extensive litigation initiated by plaintiffs seeking vacation benefits through an exception of prescription. The main thrust of its argument is that *DelCostello v. International Brotherhood of Teamsters, et al,* 103 S. Ct. ____, 1983, adopted a federal statute of limitations under Section 10b, National Labor Relations Act and that the prescriptive period in this case commenced to run on August 14, 1981, with the posting of company notices that rights to vacation benefits would be affected by the termination of plaintiffs' employment. The instant suit was filed February 23, 1982, six months and eleven days following the posting of the notices.

Plaintiffs counter the exception with the argument that the prescriptive period is three years under Louisiana Civil Code Article 3494 and also claim that the limitation

period did not commence until January 1, 1982, so that even under a six month prescriptive period, the suit was timely filed.

The court finds that the plaintiffs' action is clearly one based on a validly negotiated collective bargaining agreement. Further, the plaintiffs are seeking to enforce the terms of that collective bargaining agreement and therefore, the federal law of exhaustion of those collective bargaining terms must be applied. It would be illogical to allow the plaintiffs to seek to enforce a benefit term of this agreement while pursuing the action under different procedures than those outlined in the very agreement that they are trying to enforce. Accordingly, plaintiffs' contention that the three year period applies is without merit and the six month prescriptive period applied in this case.

DelCostello did not address the question of when this six month period should begin. *Benson v. General Motors Corporation*, 716 F2d 862 (11th Cir. 1983), held that the six month statute of limitations, under Section 10b would begin to run when the plaintiffs either knew or should have been aware of the injury itself and not when the plaintiffs became aware of one of the injuries manifestations. Other cases include the 5th Cir. decision of *Farr v. H. K. Porter Co., Inc.*, 727 F2d 502 (1984).

Certainly it could be argued that plaintiffs first had notice and knowledge on August 14, 1981, that their vacation benefits would be affected by their termination and therefore, under *Benson* and *Farr* the six month period commenced to run on August 14, 1981 and accordingly plaintiffs' suit was not timely filed. On the other hand, it is argued that plaintiffs' vacation benefits did not accrue until January 1, 1982. In support of this, attention is called

to Section 1 of Article XVII of the labor agreement between the defendant and United Paperworkers International Union and to the testimony of Billy Wayne Brown that employees accumulated vacation benefits in one year and were entitled to receive them in the following year. This procedure had been the policy and custom at the plant for some time. There is no evidence before the court to suggest that plaintiffs may have been confused about, or unaware of when the period of limitations began. Nevertheless, it is reasonable to conclude that the plaintiffs were relying on the terms of the labor agreement and the custom and policy of the plant, rather than the notices of August 13 and 14. Any ambiguity or confusion must be construed against the defendant.

For the reasons stated above, the exception of prescription is overruled.

MONROE, LOUISIANA, this 29th day of August, 1985.

/s/MICHAEL S. INGRAM
MICHAEL S. INGRAM, JUDGE
DIVISION F

COPIES OF THIS RULING SHOULD BE PROVIDED FOR:

Mr. C. A. Martin, III
Mr. C. Daniel Street

STATE OF LOUISIANA

PARISH OF OUACHITA

FOURTH JUDICIAL DISTRICT COURT

MELVIN EVANS, ET AL — FILED: October 15, 1985

VERSUS NO. 82-590

MANVILLE FOREST PRODUCTS CORPORATION — /s/NOEL CULPEPPER DEPUTY CLERK OF COURT

JUDGMENT ON EXCEPTION PRESCRIPTION

This matter came on regularly for hearing on the 11th day of June, 1985, on the Exception of Prescription filed by Defendant. Present: C. Daniel Street, attorney for Plaintiffs; C. A. Martin, III, attorney for Defendants. The Court, after hearing the pleadings, evidence and arguments of counsel, and considering the law and the evidence to be in favor thereof, for the reasons contained in the Ruling on Exception of Prescription filed September 3, 1985:

IT IS ORDERED, ADJUDGED AND DECREED that the Exception of Prescription filed herein by Defendant MANVILLE FOREST PRODUCTS CORPORATION be and the same is hereby overruled.

JUDGMENT RENDERED on September 3, 1985;

JUDGMENT SIGNED on this 15th day of October, 1985, at Monroe, Louisiana.

/s/MICHAEL S. INGRAM

APPROVED AS TO FORM:

/s/C. DANIEL STREET
C. DANIEL STREET
ATTORNEY FOR PLAINTIFFS

/s/C. A. MARTIN, III
C. A. MARTIN, III,
ATTORNEY FOR DEFENDANTS

APPENDIX E

STATE OF LOUISIANA

PARISH OF OUACHITA

FOURTH JUDICIAL DISTRICT COURT

MELVIN EVANS, ET AL — FILED: February 23, 1982

VERSUS NO. 82-590

MANVILLE FOREST PRODUCTS CORPORATION — /s/JEAN BAXTER DEPUTY CLERK OF COURT

PETITION

The Petition of MELVIN EVANS, JAMES C. ARRANT, DORIS M. AULDS, NOLAN A. BLOOD, IRA A. BROWN, WILLIAM S. BRUNSON, GEORGE L. CANFIELD, TOMMY CHRISTY, EDWARD R. CORLEY, ELISHA DAWSON, JR., VAUDIE LEE FOSTER, BILLY L. FREELAND, SIMMIE L. HEISLER, RICHARD E. HARE, BURRELL R. NEWMAN, KENNETH O. SAWYER, CHARLES W. WALKER, JIMMY J. WILSON, JAMES C. WILLIAMS, MABLE E. WINBOURNE, and J. P. WYATT, major residents of Ouachita Parish, Louisiana; and KENNETH L. BRYAN, a major resident of Union Parish, Louisiana; VERNON C. KING, a major resident of Caldwell Parish, Louisiana; and ISHMAEL E. STUCKEY, a major resident of Jackson Parish, Louisiana, respectfully represents:

1.

Made Defendant herein is MANVILLE FOREST PRODUCTS CORPORATION, a foreign corporation authorized to do and actually doing business in the State of Louisiana, and which Defendant is legally and truly indebted unto Petitioners, for the following reasons, to-wit:

2.

Petitioners are all former employees of Defendant in Defendant's Plant Forty-Five (45) of its bag plant located on Jonesboro Road in West Monroe, Ouachita Parish, Louisiana. In August, 1981, Defendant terminated Petitioners' employment with Defendant by notifying them that they were all "permanently laid-off".

3.

Under the terms of the Collective Bargaining Agreement in force between Petitioners' Union, Ouachita Local Number 654 of the United Paper Workers International Union and Defendant, which agreement was in full force and effect at all times pertinent herein, Petitioners are entitled to vacation pay from Defendant. Petitioners were all members of the said Union at all times pertinent hereto and Petitioners are all entitled to the benefits of said Collective Bargaining Agreement.

4.

Under the terms of said Collective Bargaining Agreement, employees who completed 1040 hours of work during the year are entitled to vacation pay. The number of weeks of vacation pay entitlement is determined by the

years of service of each Petitioner. Petitioners who have worked three (3) years but less than eight (8) years are entitled to two (2) weeks vacation pay; Petitioners who have worked eight (8) years but less than fifteen (15) years are entitled to three (3) weeks of vacation pay; Petitioners who have worked fifteen (15) years but less than twenty (20) years are entitled to four (4) weeks of vacation pay; Petitioners who have worked twenty (20) years but less than twenty-five (25) years are entitled to five (5) weeks of vacation pay and Petitioners who have worked twenty-five (25) years or more are entitled to six (6) weeks of vacation pay. The amount of vacation pay due per week is each Petitioners' hourly wage times fifty (50) hours.

5.

The number of years service, hourly rate of pay, number of weeks of vacation pay entitlement, and amount of vacation pay due each Petitioner is as follows:

Name	Years Service	Hourly Pay	Weeks Of Vacation Pay	Amount Due
MELVIN EVANS	25	$8.84	6	$2,652.00
JAMES C. ARRANT	24	8.19	5	2,047.50
DORIS AULDS	26	6.885	6	2,065.50
NOLAN A. BLOOD	14	8.19	3	1,228.50
IRA A. BROWN	13	7.005	3	1,050.75
WILLIAM S. BRUNSON	24	8.84	5	2,210.00
GEORGE CANFIELD	9	7.11	3	1,066.50
TOMMY CHRISTY	25	7.24	6	2,172.00
EDWARD CORLEY	16	8.19	4	1,638.00

ELISHA DAWSON, JR.	11	8.19	3	1,228.50
VAUDIE LEE FOSTER	30	6.895	6	2,068.50
BILLY L. FREELAND	7	7.37	2	737.00
SIMMIE L. HEISLER	25	8.84	6	2,652.00
RICHARD E. HARE	30	9.725	6	2,917.50
BURRELL R. NEWMAN	10	7.27	3	1,190.50
KENNETH O. SAWYER	7	7.24	2	724.00
CHARLES W. WALKER	28	9.725	6	2,917.50
JIMMY J. WILSON	11	8.19	3	1,228.50
JAMES C. WILLIAMS	25	7.695	6	2,308.50
MABLE WINBOURNE	25	8.195	6	2,458.50
J. P. WYATT	24	8.84	5	2,210.00
KENNETH L. BRYAN	13	8.19	3	1,228.50
VERNON C. KING	26	8.19	6	2,457.00
ISHMAEL E. STUCKEY	27	9.725	6	2,917.50

6.

Petitioners show that upon their initial employment with Defendant, they were required to work a full year prior to receiving a vacation. Defendant's refusal to pay the vacation benefits due results in Petitioners having earned a vacation but not receiving same.

7.

Petitioners show that they made due demand upon Defendant for the vacation pay due them during the week of January 5, 1982. Defendant refused to pay Petitioners their vacation pay and informed certain of Petitioners that it was of no avail for any more of Petitioners to appear and demand their vacation pay because they were not going to get it.

8.

In addition, Petitioners show that their undersigned counsel sent a demand letter for this vacation pay to Defendant by Certified Mail, return receipt requested, and the same was received by Defendant on February 17, 1982. Petitioners show that Defendant has failed and refused to pay the vacation benefits due Petitioners within three (3) days of demand thereof, as required by Louisiana Revised Statute 23:631, et seq, and particularly Louisiana Revised Statute 23:640 and Defendant is therefore liable unto Petitioners for the amount of vacation pay due each, plus a like amount as a penalty, under the terms of said Statutes. In the alternative, and in the alternative only, Petitioners aver that Defendant's refusal to pay these vacation benefits is arbitrary, in bad faith, and without cause.

9.

In addition, under the terms of said Statute, Defendant's refusal to pay these benefits upon demand in accordance with the Statute entitles Petitioners to recover a reasonable attorney fee from Defendant for the institution and prosecution of this action.

10.

Plaintiff show that there was no legal requirement for them to file a specific grievance on vacation pay because a previous grievance filed by them on a seniority issue was not prosecuted by the union on the ground that plaintiffs were no longer union members and the filing of another grievance would therefore have been a vain and useless thing, and that plaintiffs had no remedy except to file suit. [Added by oral amendment at trial.]

WHEREFORE, PETITIONERS PRAY that Defendant be duly served and cited with a copy of this Petition, and after the lapse of all legal delays and after due proceedings had, that there be judgment herein in favor of Petitioners and against Defendant MANVILLE FOREST PRODUCTS CORPORATION as follows:

> In favor of Petitioner MELVIN EVANS in the full and true sum of TWO THOUSAND SIX HUNDRED FIFTY-TWO AND NO/100 ($2,652.00) DOLLARS, plus a like amount as penalty;
>
> In favor of Petitioner JAMES C. ARRANT in the full and true sum of TWO THOUSAND FORTY-SEVEN AND 50/100 ($2,047.50) DOLLARS, plus a like amount as penalty;
>
> In favor of Petitioner DORIS M. AULDS in the full and true sum of TWO THOUSAND SIXTY-FIVE AND 50/100 ($2,065.50) DOLLARS, plus a like amount as penalty;
>
> In favor of Petitioner NOLAN A. BLOOD in

the full and true sum of ONE THOUSAND TWO HUNDRED TWENTY-EIGHT AND 50/100 ($1,228.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner IRA A. BROWN in the full and true sum of ONE THOUSAND FIFTY AND 75/100 ($1,050.75) DOLLARS, plus a like amount as penalty;

In favor of Petitioner WILLIAM S. BRUNSON in the full and true sum of TWO THOUSAND TWO HUNDRED TEN AND NO/100 ($2,210.00) DOLLARS, plus a like amount as penalty;

In favor of Petitioner GEORGE L. CANFIELD in the full and true sum of ONE THOUSAND SIXTY-SIX AND 50/100 ($1,066.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner TOMMY CHRISTY in the full and true sum of TWO THOUSAND ONE HUNDRED SEVENTY-TWO AND NO/100 ($2,172.00) DOLLARS, plus a like amount as penalty;

In favor of Petitioner EDWARD R. CORLEY in the full and true sum of ONE THOUSAND SIX HUNDRED THIRTY-EIGHT AND NO/100 ($1,638.00) DOLLARS, plus a like amount as penalty;

In favor of Petitioner ELISHA DAWSON, JR. in the full and true sum of ONE THOUSAND

TWO HUNDRED TWENTY-EIGHT AND 50/100 ($1,228.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner VAUDIE LEE FOSTER in the full and true sum of TWO THOUSAND SIXTY-EIGHT AND 50/100 ($2,068.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner BILLY L. FREELAND in the full and true sum of SEVEN HUNDRED THIRTY-SEVEN AND NO/100 ($737.00) DOLLARS, plus a like amount as penalty;

In favor of Petitioner SIMMIE L. HEISLER in the full and true sum of TWO THOUSAND SIX HUNDRED FIFTY-TWO AND NO/100 ($2,652.00) DOLLARS, plus a like amount as penalty;

In favor of Petitioner RICHARD E. HARE in the full and true sum of TWO THOUSAND NINE HUNDRED SEVENTEEN AND 50/100 ($2,917.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner BURRELL R. NEWMAN in the full and true sum of ONE THOUSAND ONE HUNDRED NINETY AND 50/100 ($1,190.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner KENNETH O. SAWYER in the full and true sum of SEVEN HUNDRED TWENTY-FOUR AND NO/100 ($724.00)

DOLLARS, plus a like amount as penalty;

In favor of Petitioner CHARLES W. WALKER in the full and true sum of TWO THOUSAND NINE HUNDRED SEVENTEEN AND 50/100 ($2,917.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner JIMMY J. WILSON in the full and true sum of ONE THOUSAND TWO HUNDRED TWENTY-EIGHT AND 50/100 ($1,228.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner JAMES C. WILLIAMS in the full and true sum of TWO THOUSAND THREE HUNDRED EIGHT AND 50/100 ($2,308.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner MABLE WINBOURNE in the full and true sum of TWO THOUSAND FOUR HUNDRED FIFTY-EIGHT AND 50/100 ($2,458.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner J. P. WYATT in the full and true sum of TWO THOUSAND TWO HUNDRED TEN AND NO/100 ($2,210.00) DOLLARS, plus a like amount as penalty;

In favor of Petitioner KENNETH L. BRYAN in the full and true sum of ONE THOUSAND TWO HUNDRED TWENTY-EIGHT AND 50/100 ($1,228.50) DOLLARS, plus a like amount as penalty;

In favor of Petitioner VERNON C. KING in the full and true sum of TWO THOUSAND FOUR HUNDRED FIFTY-SEVEN AND NO/100 ($2,457.00) DOLLARS, plus a like amount as penalty;

In favor of Petitioner ISHMAEL E. STUCKEY in the full and true sum of TWO THOUSAND NINE HUNDRED SEVENTEEN AND 50/100 ($2,917.50) DOLLARS, plus a like amount as penalty.

FURTHER PRAY that there be judgment herein in favor of Petitioners and against Defendant MANVILLE FOREST PRODUCTS CORPORATION for a reasonable attorney fee in an amount to be fixed by the Court;

FURTHER PRAY that Petitioners recover legal interest on all sums due from date of judicial demand, until paid;

FURTHER PRAY that Defendant be condemned to pay all costs of these proceedings.

Respectfully submitted,

KOSTELKA, SWEARINGEN AND STREET
ATTORNEYS FOR PETITIONERS
2200 Forsythe Avenue
Monroe, Louisiana 71201

BY: /s/C. Daniel Street
C. DANIEL STREET

PLEASE SERVE DEFENDANT
MANVILLE FOREST PRODUCTS
CORPORATION
Through its Registered Agent
for the Service of Process
C T Corporation System
1300 Hibernia Building
New Orleans, Louisiana 70112

APPENDIX F

LABOR AGREEMENT

MANVILLE CORPORATION

PACKAGING DIVISION

WEST MONROE, LOUISIANA

AND

UNITED PAPERWORKERS
INTERNATIONAL UNION

November 1, 1980 through October 31, 1984

AGREEMENT

THIS AGREEMENT by and between Manville Forest Products Corporation, a Delaware corporation, hereinafter referred to as "Company" and United Paperworkers International Union, AFL-CIO, and its Local Number 654, hereinafter referred to as the "Union".

* * *

VIII.

ADJUSTMENT OF GRIEVANCES

(a) Any dispute or grievance arising out of the interpretation or application of the terms of this Agreement shall be settled in accordance with the grievance steps hereinafter set forth, provided, however, that the settlement and discussion of the grievance shall in no way interrupt production or hinder the efficient operation of the Company's plants.

1. A grievance shall be presented to the aggrieved employee's immediate foreman within five (5) working days from the act or omission giving rise thereto. An earnest attempt shall be made to arrive at a settlement thereof. Failing satisfactory adjustment within five (5) working days after the grievance has been submitted to the employee's immediate foreman, the aggrieved employee and/or the employee's union representative may refer the matter to the next step within five (5) working days after action of the foreman.

2. Personnel in the following positions will hear grievances:

Production Manager-Coated and Laminated Products
Production Manager-Carton Products
Production Manager-Corrugated Containers
Plant Manager-Standard Bag Products
Plant Manager-Specialty Bag Products
Plant Manager-Multiwall Bag Products
General Transportation Manager-Traffic

The grievance when referred to the second step shall be in writing and shall state the specific provisions of the Agreement (giving the page and paragraph thereof) which are believed to have been violated and specify the pertinent details of the act or omission giving rise to said grievance. If the appropriate manager fails to adjust a grievance in a satisfactgory manner within seven (7) calendar days after it has been presented to the manager in the manner aforesaid, the aggrieved employee or the employee's union representatives may appeal the matter to the Director, Personnel and Industrial Relations, within fifteen (15) calendar days after action of the appropriate manager.

3. The Director, Personnel and Industrial Relations, or his designee will arrange a meeting within five (5) calendar days after receipt of the grievance. Failure of the Director, Personnel and Industrial Relations, or his designee to render a decision within fifteen (15) days after this meeting shall be considered as a decision adverse to the aggrieved and the grievance may be submitted to arbitration. The Union, if arbitration is desired, shall, within thirty (30) days from the date of the Director,

Personnel and Industrial Relations of his designee's decision, make a written request for arbitration.

(b) On the personal request of an aggrieved employee or his or her Union representatives the management shall advise the aggrieved employee in writing of the decision of the Foreman, the appropriate Division or Department Manager or the Director, Personnel and Industrial Relations.

(c) Failure of a Foreman or appropriate Division or Department Manager to render a decision in regard to individual grievances within the time specified in this Article shall be considered as a decision adverse to the aggrieved, and the grievance shall be advanced to the next highest step. If more than one grievance is filed with respect to the same act or omission giving rise thereto, the grievance shall be consolidated for hearing and decision in every step of the procedure hereby provided for settlement and arbitration.

(d) It is understood and agreed that a Local Union has the right to process a grievance on behalf of any employee or group of employees represented by it. In cases of a Union grievance concerning the collective interest of the employees in its Local the preliminary steps of the grievance procedure may be eliminated and the grievance carried to the Director, Personnel and Industrial Relations or his designee.

In cases of grievances arising out of an assignment of work involving jurisdiction between plant employees and outside employees, and grievances arising out of discharged employees, the preliminary steps of the grie-

vance procedure may be eliminated and the grievance carried to the appropriate Division or Deparment Manager. The next step will then be to the Director, Personnel and Industrial Relations or his designee.

(e) Except as otherwise provided in this Article, all reference to time limits expressed in days are intended to refer to calendar days. Time limits may be extended by mutual agreement. Failure to comply with said procedure with respect to the time and manner of filing grievances, appeals, and requests for arbitration shall constitute a waiver of such grievances on the part of any employee and the Union and such grievance shall be deemed forever concluded and closed.

(f) The Union Committee attending grievance meetings will be limited to five (5) Union representatives plus the aggrieved employee or employees. Additional employees may be brought into the meetings long enough to give information pertinent to the grievance. An employee whose presence at grievance meeting is necessary during his working hours will not lose any pay except when a replacement is called in requiring overtime while the employee is away from the job.

IX.

ARBITRATION PROCEDURES

In the event any grievance shall not have been satisfactorily settled after recourse has been had as hereinabove provided for the settlement of such grievances, any such grievance may be submitted to arbitration. All arbitrations involving issues arising under the nondiscrimina-

tion clause of the contract or other EEOC or civil rights issues, or issues of work jurisdiction between converting operations and nonconverting operations forces, or issues which might be properly subject to arbitration, under Article XXIX of the Labor Agreement (issues not previously arbitrable under this Article will remain nonarbitrable), or issues involving the interpretation or meaning of any State or Federal Law shall be handled as specified in paragraphs A through E, below. All other disputes shall be handled as specified in the expedited procedure at paragraphs F through I, below. The parties may mutually agree in writing to elect to resolve any dispute through the expedited procedure.

A. Within five (5) days of the Union's notification to the Company of its desire to arbitrate the grievance involved, the parties will meet and attempt in good faith to select a mutually satisfactory impartial arbitrator. In the event of failure to agree on an impartial arbitrator the parties will within fifteen (15) days jointly request the Federal Mediation and Conciliation Service to furnish a panel of seven (7) arbitrators, and of such panel the parties will alternately strike names until one remains, who shall be the arbitrator. The parties shall alternate in striking the first name of the FMCS panel with the Union striking the first name in the first case arising under this jurisdiction.

B. The arbitrator shall, as soon as possible, proceed to hear the representatives of the Union and the Company. The arbitrator shall have no power to add to, subtract from, alter, amend or disregard any provision of this Agreement.

C. The arbitrator shall render his award within thirty (30) days after the close of the hearing. A decision of the arbitrator shall be final and binding upon the Company, the International Union, the local Union and the employees involved.

D. The Company and the Union shall each bear the expense and fee of their respective representatives, but the fee and the expenses of the impartial arbitrator shall be paid by the losing party.

E. No more than one (1) grievance shall be submitted to the same arbitrator within a six (6) month period, except by mutual agreement, unless the issues are the same.

F. Within five (5) days of the Union's notification to the Company of its desire to arbitrate a grievance or grievances involving any issue except those arising under the nondiscrimination clause of the contract or other EEOC or civil rights issues, or issues of work jurisdiction between Packaging Operations and non-Packaging Operation forces, or issues which might be properly subject to arbitration under Article XXIX of the Labor Agreement or those involving the interpretation or meaning of any State or Federal Law, an arbitrator will be selected at random from the permanent panel of arbitrators selected as described in paragraph I, below. The parties will jointly furnish the FMCS with the name of the arbitrator. The FMCS will immediately appoint the arbitrator to hear the grievance or grievances in dispute and the arbitrator shall arrange with the parties a mutually agreeable date within thirty (30) days of his ap-

pointment for the hearing. The arbitrator shall give at least seventy-two (72) hours notice of the time and place of the hearing to the parties, which may be given orally.

G. No one arbitrator may be selected to hear more than two (2) disputes under this procedure at any one time and a two hour interval shall be allowed between the hearing of the two disputes. Any party may file a written submission in support of his position with the arbitrator on the day of the arbitrtation hearing. The arbitrator shall have no power to add to, subtract from, alter, amend or disregard any provisions of this Agreement. The arbitrator shall render a written award within thirty (30) days after the close of the hearing. Said award will include a brief written explanation for the basis of his conclusion. A decision of the arbitrator shall be final and binding upon the Company, the International Union, the local Union and the employees involved.

H. The Company and the Union shall bear the expense and fee of their respective representatives, and the fee and expenses of the impartial arbitrator shall be shared and paid equally by the Company and the Union.

I. The parties will request from the FMCS a list of thirty (30) experienced arbitrators from the general geographical area of the southeastern and southwestern United States who are willing to function under this procedure. The parties will alternatively strike ten names each from this list and the remaining ten arbitrators shall be appoin-

ted by the FMCS as a permanent panel of arbitrators for the duration of this agreement. In the event of a vacancy on the permanent panel, the parties shall request that the FMCS appoint the last arbitrator stricken from the original list of thirty as a member of the panel.

* * *

XVII.

VACATIONS

Section 1. Eligibility

All employees who on January 1, of any year have been continuously employed for one (1) or more years shall be entitled to vacation with pay subject to the provisions set forth in this Article; however, in order to be eligible for a vacation of one, two, three, four, five, or six weeks, as the case may be, an employee must have completed at least ten hundred forty (1040) hours of work during the previous calendar year or during the twelve (12) month period prior to his or her scheduled vacation. In no event, however, shall any employee become entitled to two (2) vacations in any one calendar year. Vacation pay under the provisions of this Article will be as follows:

	Effective 11/1/80
One (1) week	50 hours pay
Two (2) weeks	100 hours pay
Three (3) weeks	150 hours pay
Four (4) weeks	200 hours pay
Five (5) weeks	250 hours pay
Six (6) weeks	300 hours pay

Each employee's vacation pay shall be computed at the straight time base hourly rate of pay of his or her current regular classified job at the time the vacation is taken. However, an employee who at the time of his or her vacation is temporarily upgraded and has been so upgraded for two (2) continuous days worked during his or her normal work schedule shall have his or her vacation pay computed on his or her upgraded rate.

Section 2. Length of Vacations

(a) Length of vacations shall be determined on the basis of an employee's continuous Company service. Continuous service shall be computed as of January 1 of each year.

SCHEDULE OF BENEFITS:

Employees with at least:	
1 year, but less than 3 years	1 week
3 years, but less than 8 years	2 weeks
8 years but less than 15 years	3 weeks
15 years, but less than 20 years	4 weeks
20 years, but less than 25 years	5 weeks
25 or more years	6 weeks

Effective November 1, 1982	
8 years, but less than 12 years	3 weeks
12 years, but less than 20 years	4 weeks

(b) An employee whose 1st and 3rd anniversary date of employment falls after January 1 of the current year will be entitled to the additional vacation provided by this plan after the actual anniversary date is reached. Employees who on January 1 of each year of this Agree-

ment shall not have completed the necessary amount of continuous service to qualify for three, four, five, or six weeks vacation but who will complete such continuous service prior to the next succeeding January 1 shall not be required to wait until their anniversary date in order to take their additional week(s) of vacation in that calendar year; however, if the employee terminates his or her employment for any reason prior to such qualifying date, and prior to actually taking the additional vacation, he or she will not be entitled to such additional week(s) of vacation or pay.

Section 3.

(a) Scheduling of vacations shall be from January 1 through December 31 (the vacation period). Employees who become eligible for a vacation on a calendar year basis (those who have worked 1040 hours during a calendar year) shall take such vacation during the vacation period next following the calendar year in which they become eligible. Employees who become eligible for a vacation on a twelve month basis shall take such vacation during the current vacation period. Employees will be permitted to select vacation dates on a seniority basis subject to approval of the Company. Each employee, who becomes eligible on January 1 for a vacation, must have specified to the Company not later than December 1 of the previous year, the time at which he or she desires to take his or her vacation. In the event two or more employees select the same vacation time, the employee with most Company seniority shall be given preference. However, if an employee has not specified his or her vacation preference by December 1 of the previous year, the employee forfeits his or her right to exercise his or her seniority for vacation preference. The Company intends to respect the rights herein

granted to employees of selecting their vacation time, but if in its sole and exclusive judgment such is deemed to be essential to its operations, it reserves the right to shut down all or any of its plants for a period of one week and to designate such shutdown as a vacation shutdown. In this event the Company will, sixty (60) days prior to the shutdown, announce to the employees of the plant or plants which are to be shut down, the time of the shutdown and affected employees entitled to vacation pay benefits will be paid the full amount of same on the pay period immediately preceding the vacation shutdown so designated by the Company in lieu of any other vacation right or benefit. However, those affected employees entitled to a vacation of fourteen (14) days, twenty-one (21) days, twenty-eight (28) days, thirty-five (35) days, or forty-two (42) days, as the case may be, will be granted an additional vacation of not exceeding seven (7) consecutive days, fourteen (14) consecutive days, twenty-one (21) consecutive days, twenty-eight (28) consecutive days, or thirty-five (35) consecutive days, as the case may be, without pay, in addition to the shutdown period, at time designated by them during the remainder of the calendar year subject to approval of the Company and provided that the Company can make suitable arrangements for their replacement while they are off duty. Should the Company designate a shutdown of any or all of its plants as a vacation shutdown but continue any portion of the operations at the plant which is shutdown, employees regularly employed in the particular operation which is continued shall have the option of working and of exercising their seniority. Employees who work during vacation shutdown under either condition shall have the right to take their vacation at times to be specified by them as provided above. The Company is not hereby restrained from shutting down all or any of its plants during the period from January 1 to December 31

because of the exigencies of the Company's business and in not designating such shutdown as a vacation shutdown period. Notwithstanding to the contrary, employees who are eligible for two weeks vacation or less may have an option of scheduling their vacation during the vacation shutdown period or at another time in accordance with the scheduling provision of this Article.

(b) Holidays and Sundays during the time an employee is on vacation shall be counted as part of the employee's vacation period.

(c) Vacations due in any year must be taken during that year's vacation period. Vacations are not accumulative and are not transferrable. If desired, an employee may draw his or her vacation pay at the beginning of his or her vacation period or at any other time of the year provided the employee gives the Company at least two weeks notice of his or her desire and the employee is eligible for such vacation pay. An employee who is entitled to a vacation of more than one week shall have the option of splitting his or her vacation into three (3) parts, but each part shall be in increments of full weeks. No employee shall have the right of more than one (1) first choice when splitting his or her vacation.

(d) Any employee who voluntarily resigns from the Company, who is discharged for cause prior to the time his or her vacation period is scheduled to begin, shall nevertheless be entitled to the vacation pay to which he or she would otherwise be eligible. For the purpose of determining vacation benefits, an employee's continuous service shall be broken in the event of:

1. discharge;
2. quitting;

3. failure to return from leave of absence granted in accordance with Article XVII, Leave of Absence, and Article III, Company Policy.

4. absence due solely and exclusively to compensable injuries received in the course of employment by the Company where the same extends beyond twenty-four (24) months.

(e) An employee who is terminated from the Company by reason of retirement under the provisions of the Company's Retirement Plan and employees who accept early retirement and/or disability retirement shall be paid a sum equivalent to vacation pay if he/she has worked at least 1040 hours since his/her last vacation eligibility date. If such employee has worked less than 1040 hours since his/her vacation eligibility date, he/she shall be paid a sum computed on a prorated basis dependent on the hours worked since his/her last vacation eligibility as related to 1040 hours.

(f) In the event of death of an employee who is qualified for but has not used the vacation for which he or she is eligible, the vacation pay will be paid to the employee's beneficiary as indicated on the employee's insurance enrollment form unless otherwise designated by the employee in writing.

* * *

XXIV.

LAWS AND REGULATIONS

(a) Any Federal or State Law, Federal or State Regulation, or any conclusive judicial interpretation

thereof, which may conflict with any provisions of this Agreement, shall void only such provisions and not affect any other provision of this Agreement.

* * *

APPENDIX G
WAGE PAYMENT STATUTES

Alaska	Alaska Stat. § 23.05.140 (1984)
Arizona	Ariz. Rev. Stat. Ann. § 23-353 (1983)
Arkansas	Ark. Stat. Ann. § 81-308 (1976
California	Cal. Labor Code § 201 and 202 (West 1971)
Colorado	Colo. Rev. Stat. § 8-4-104 (1986)
Connecticut	Conn. Gen. Stat. Ann. § 31-71c (West 1987)
Deleware	Del. Code Ann. tit. 19 § 1103 (1985)
Dist. of Columbia	D.C. Code Ann. § 36-603 (1968)
Georgia	Ga. Code Ann. § 34-7-2 (1987 supp.)
Hawaii	Haw. Rev. Stat. § 388-3 (1985)
Idaho	Idaho Code § 45-606 (1977)
Illinois	Ill. Ann. Stat. ch. 48 para. 39 m-5 (Smith-Hurd 1986)
Indiana	Ind. Code Ann. § 22-2-5-1 (Burns 1986)
Iowa	Iowa Code Ann. § 91A.4 (West 1984)
Kansas	Kan. Stat. Ann. § 44-315 (1986)
Kentucky	1986 Ky. Rev. Stat. & R. Serv. 337.055 (Baldwin)
Louisiana	La. R.S. 23:631, et. seq. (1985)
Maine	Me. Rev. Stat. Ann. tit. 26, § 626 (1986 supp.)
Maryland	Md. Ann. Code art. 100, § 94(e) (1985)
Massassachusetts	Mass. Ann. Laws ch. 149, § 148 (Law. Co-op. 1976)
Minnesota	Minn. Stat. Ann. § 181.11 (West 1966)
Michigan	Mich. Comp. Laws Ann. § 408.475 (West 1985)
Mississippi	Miss. Code Ann. § 71-1-35 (1972)
Missouri	Mo. Ann. Stat. § 290.110 (Vernon 1987 supp.)
Montana	Mont. Code Ann. § 39-3-205 (1985)

Nebraska	Neb. Rev. Stat. § 48-1230 (1984)
Nevada	Nev. Rev. Stat. Ann. § 608.020, 608.030 (Michie 1986)
New Hampshire	N.H. Rev. Stat. Ann. § 275:44 (1955)
New Jersey	N.J. Rev. Stat. Ann. § 34.11-4.3 (West 1987 supp.)
New Mexico	N.M. Stat. Ann. § 50-4-4 (1978)
New York	N.Y. Labor § 191 (McKinney 1986)
North Carolina	N.C. Gen. Stat. § 95-25.7 (1985)
North Dakota	1980 N.D. Laws 34-14-03
Ohio	Ohio Rev. Code Ann. § 4113.15 (Baldwin 1983)
Oklahoma	Okla. Stat. Ann. tit. 39, § 165.3 (1986)
Oregon	Or. Rev. Stat. § 652.140 (1981)
Pennsylvania	Pa. Stat. Ann. tit 43, § 260.5 (Purdon 1964 and 1987 supp.)
Rhode Island	R.I. Gen. Laws § 28-14-4 (1986)
South Carolina	S.C. Code Ann. § 41-11-170 (Law. Co-Op. 1986)
South Dakota	S.D. Codified Laws Ann. § 60-11-10 (1978)
Tennessee	Tenn. Code Ann. § 50-2-103 (1983)
Texas	Tex. Lab. Code Ann. § 5156 (Vernon 1987)
Utah	Utah Code Ann. § 34-28-5 (1953)
Vermont	Vt. Stat. Ann. tit. 21, § 342 (1978 and 1986 supp.)
Virginia	Va. Code Ann. § 40.1-29 (1986)
Washington	Wash. Rev. Code Ann. § 49.48.010 (1987 supp.)
West Virginia	W. Va. Code § 21-5-4 (1985)
Wisconsin	Wis. Stat. Ann. § 109.03 (West 1986 supp.)
Wyoming	Wyo. Stat. § 27-4-104 (1987)
Puerto Rico	P.R. Laws Ann. 29, § 173 (1985)

Supreme Court, U.S.
FILED
DEC 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MANVILLE FOREST PRODUCTS CORPORATION,
Petitioner,

versus

MELVIN EVANS, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. DANIEL STREET
BRUSCATO, LOOMIS & STREET
2011 HUDSON LANE
P.O. BOX 2374
MONROE, LOUISIANA 71207
TELEPHONE: (318) 325-7577
Attorneys for Respondents

A-FAB PRINTING SERVICE ★ MONROE, LA ★ (318) 325-0470

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SUMMARY OF ARGUMENT

1. Petitioner failed to attack the constitutionality of the Louisiana Statute upon which this action was brought in the lower courts and therefore this Honorable Court should not consider that issue.

Respondents brought their suit under the provisions of *Louisiana Revised Statute* 23:631 and 640 which grants a cause of action for collection of vacation pay under collective bargaining agreements. Although Petitioner argued that federal law applied, Petitioner failed to file any specific pleading attacking the unconstitutionality of this Louisiana Statute in the lower courts, which is a requirement for jurisdiction in this Honorable Court. It is also a requirement of Louisiana law that such constitutional issue be raised in the lower court. In order for this Honorable Court to grant any relief to Petitioner, it would have to declare *Louisiana Revised Statute* 23:631 and 640 unconstitutional as violative of the Supremacy Clause of the United States Constitution. Since such issue was not raised at the lower court level, and not passed upon by the lower courts, this Honorable Court should not consider that position.

2. The decision of the Louisiana Court in this matter does not conflict with the constitutional principle of federal pre-emption of labor disputes.

A line of federal cases holds that the pre-emption rule is not applicable and employees are not bound by a grievance procedure or arbitration where they are seeking to enforce statutorily granted rights. *Barrentine v. Arkansas-Best*

Freight System, 450 U.S. 728, 67 L.Ed. 2d 641, 101 S.Ct. 1437 (1981); *Amaro v. Continental Can Company,* 724 F.2d 747 (9 Cir. 1984); *Barrowclough v. Kidder, Peabody and Company, Inc.,* 752 F.2d 923 (3 Cir. 1985); *McLendon v. Continental Group, Inc.,* 602 F.Supp. 1492 (D.N.J. 1985) and *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367 (9 Cir. 1984).

Other cases hold that in a situation such as this where the former union members no longer have a bargaining unit and no longer have a supervisor they are not bound by the grievance procedure. *Anderson v. Alpha Portland Industries, Inc.,* 752 F.2d 1293 (8 Cir. 1985) and *Schneider Moving & Storage Company v. Robbins,* 104 S.Ct. 1844 (1984).

Further, the grievance procedure is designed to settle work place disputes, not financial disputes for the actual collection of wages due.

3. This action is not a suit under Section 301 of the Labor Management Relations Act nor is it a "hybrid" action.

The present lawsuit is one brought under specific provisions of Louisiana law and is not an action by a union against the employer nor is it a "hybrid" action by the employees against the union and employer. Therefore, the rules for suits under Section 301 of the Labor Management Relations Act and "hybrid" suits are not applicable.

4. The majority rule under federal law is that Respondents are entitled to collect their vacation pay.

Among the federal courts, the majority rule is that in this situation, where the employee is discharged through no fault of his own after having qualified for vacation pay except for being employed on a certain date, the employee is entitled to collect his vacation pay. *Local 186, United Packinghouse Workers v. Armour and Company,* 446 F.2d 610 (6 Cir. 1971); *Schneider v. Electric Auto-Lite Company,* 456 Fed.2d 366 (6 Cir. 1972). The same rule obtains under Louisiana law. Louisiana Civil Code Article 1771; *Morse v. J. Ray McDermott and Company, Inc.,* 344 So.2d 1353 (S.Ct. 1977).

Therefore, under both state and federal law Respondents in this case were properly awarded their vacation pay.

ARGUMENT

I.

PETITIONER FAILED TO ATTACK THE CONSTITUTIONALITY OF THE LOUISIANA STATUTE UPON WHICH THIS ACTION WAS BROUGHT IN THE LOWER COURTS AND THEREFORE THIS HONORABLE COURT SHOULD NOT CONSIDER THAT ISSUE.

This action was brought in the Fourth Judicial District Court for the Parish of Ouachita, State of Louisiana, under the provisions of a Louisiana statute, that being *Louisiana Revised Statute* 23:631 *et seq.*, which statute is set out verbatim in the appendix hereto. In their suit Respondents sought recovery of vacation pay, penalties and attorney fees. Respondents were awarded their vacation pay and attorney fees but no penalties.

As can be seen from a reading of the plain provisions of *Louisiana Revised Statute* 23:640, the statute grants a cause of action for collection of vacation pay under collective bargaining agreements and the statute denominates said vacation pay as "wages" within the meaning of the statute. The fact that Respondents were proceeding under the terrms of said statute is made abundantly clear in Paragraph 8 of their original petition.

Despite this, Petitioner, MANVILLE FOREST PRODUCTS CORPORATION, did not challenge the constitutionality of this Louisiana statute in the Trial Court by

appropriate pleading directed to that issue. Petitioner did argue that Federal labor law was applicable but never filed a specific pleading attacking the constitutionality of *Louisiana Revised Statute* 23:640. In Louisiana, the unconstitutionality of a statute must be specially pleaded in the trial court, and the grounds particularized. *Castille v. Evangeline Parish School Board,* 304 So.2d 701 (3 Cir. 1974).

In order for this Honorable Court to grant any relief to Petitioner, even if it agreed with Petitioner's position, it would have to declare *Louisiana Revised Statute* 23:640 unconstitutional, null and void as violative of the Supremacy Clause of the United States Constitution. Although Petitioner did argue in the Lower Courts that federal law applied, it did not raise its argument to the level of a constitutional challenge. In view of this, this Honorable Court has no jurisdiction to declare this statute unconstitutional and therefore has no means to grant relief to Petitioner even if Petitioner were correct, which is denied.

II.

THE DECISION OF THE LOUISIANA COURT IN THIS MATTER DOES NOT CONFLICT WITH FEDERAL PRE-EMPTION OF LABOR DISPUTES.

In its petition for a Writ of Certiorari Petitioner has conveniently left out a line of federal cases which provides an exception to the general law on pre-emption of labor disputes, particularly with regard to Petitioner's argument

that Respondents are limited to the grievance procedure and arbitration set forth in the collective bargaining agreement. That line of cases holds that the employees are not bound by a grievance procedure or arbitration and do not have to exhaust the same where their rights are based on a statute. In *Barrentine v. Arkansas Best-Freight System*, 450 U.S. 728, 67 L.Ed. 2d 641, 101 S.Ct. 1437 (1981), the unionized employees actually went through a grievance procedure claiming that they were entitled to be paid for certain time worked by them under the terms of the collective bargaining agreement and the Fair Labor Standards Act. They lost the arbitration claim and the arbitration was supposed to be binding. The United States Supreme Court reversed the decisions of the lower courts that the Plaintiffs were bound by the arbitration. This Court held that since the claim was based upon the Fair Labor Standards Act, a statute, the employees were not bound by the grievance procedure. The Court stated, at 101 S.Ct. 1443:

> "We reject this argument. Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."

The Court noted that the grievance process was not

sufficient to support the strong public interest in the employee being paid his wages. The same can be said of the present case. As was recognized by the Second Circuit Court of Appeal, the State of Louisiana has determined through this statute under which this suit was brought that it is a matter of strong public policy that persons be allowed to enforce their rights to collect their wages, including vacation wages, in the courts of this state even if those wages derive from a collective bargaining agreement. It is a matter of strong public policy not only in this state but nationwide that laborers collect their wages.

The lower Federal Courts have applied the rule that employees seeking to enforce statutory rights are not bound by the grievance procedure in many different contexts. It has been held that claims under the Employment Retirement Income Security Act were not subject to the exhaustion of a grievance procedure rule. See *Amaro v. Continental Can Company*, 724 F.2d 747 (9 Cir. 1984); *Barrowclough v. Kidder, Peabody and Co., Inc.*, 752 F.2d F.2d 923 (3 Cir. 1985).

In the case of *McLendon v. Continental Group, Inc.*, 602 F.Supp. 1492 (D.N.J. 1985), the Court made the very same holding in the context of ERISA claims and RICO claims and in its opinion the Court listed many cases recognizing and applying this principle under several different types of statutory claims.

In another similar situation, the Court in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9 Cir. 1984) recognized that a Plaintiff who brought a state court claim for wrongful termination was not bound by the grievance

procedure and additionally held that the claim was not preempted by federal law.

Another point in the present matter is that these Respondents were no longer considered employees and were no longer considered union members. They no longer had a bargaining unit to which they belonged and they no longer had a foreman or supervisor because the plant was shut down. Therefore, the express language of the grievance procedure does not even apply to them. This type of position was recognized as excepting the Plaintiffs from the provision of the grievance procedure in the case of *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8 Cir. 1985) and *Schneider Moving and Storage Company v. Robbins*, 104 S.Ct. 1844 (1984).

Finally, the grievance procedure is designed to settle work place disputes, not financial disputes with the employer. It is respectfully submitted that in none of the federal Statutes has Congress indicated its intent to take on all wage collection disputes. The matter of whether or not wages due have been paid has traditionally been a state concern, not a federal one. If Petitioner's position is correct, then workers would have to depend upon a vote of the union in order to collect wages earned. That is a ridiculous contention. Yet this is exactly what the Petitioner in this case is proposing.

III.

THIS ACTION IS NOT A SUIT UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT NOR IS IT A "HYBRID" ACTION.

It is respectfully submitted that Petitioner is totally wrong that this is a suit under Section 301 of the Labor Management Relations Act or a "hybrid" such as that found in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 76 L.Ed. 2d 476, 103 S.Ct. 2281 (1983). In that case, this Honorable Court did not in any way limit the doctrine of the statutory right exception discussed hereinabove and its decision was limited to actions under the Labor Management Relations Act and "hybrid" actions. The present suit is based upon *Louisiana Revised Statute* 23:631-640. This is not a "hybrid" action against the union and the employer. This is a totally different lawsuit under a state statute designed to protect parties who have earned wages and have not been paid. The Court in *Del Costello* held that a six (6) month limitations period would be applied to suits under the Labor Management Relations Act because there was no close analogy in ordinary state law for the type of action involved. Here, there is specific law in Louisiana setting forth the limitation of time available to claim wages due but not paid. Article 3494 of the Louisiana Civil Code provides for a three (3) year prescriptive period for such suits.

Even if the six (6) month rule somehow applied to the present case, the suit was still timely filed in February, 1982, because the vacation wages were not payable until

January 1, 1982, under the terms of the collective bargaining agreement.

IV.

THE MAJORITY RULE UNDER FEDERAL LAW IS THAT RESPONDENTS ARE ENTITLED TO COLLECT THEIR VACATION PAY.

On the merits of the vacation pay issue, the federal law is clear that Respondents are entitled to their vacation pay. All of the Respondents had completed 1040 hours of work and were eligible for the vacation pay except that they were not employed on January 1, 1982, due to the fact that they were unilaterally permanently laid off by Petitioner in August, 1981. Under Louisiana law, a condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment. Louisiana Civil Code Article 1771; *Morse v. J. Ray McDermott and Co., Inc.*, 344 So.2d 1353 (S.Ct. 1977).

Furthermore, express Louisiana law prohibits a contract forfeiting wages, which term would include vacation pay, and the Second Circuit Court of Appeal held that this provision of *Louisiana Revised Statute* 23:634 likewise applied in this situation.

Finally, the weight of federal law is on the side of Respondents in this situation. In the case of *Local 186, United Packinghouse Workers v. Armour and Company,* 446 F.2d 610 (6 Cir. 1971) the same issue was involved. In fact, the situation was remarkably similar to the present case. In

that case, the contract provided for continuous service as of January 1 and eligibility for vacation provided that the worker had worked a minimum of 150 days during the preceeding calendar year. The company closed the plant in September and refused to pay the vacation pay to those workers who had worked 150 days. The Sixth Circuit Court of Appeal reversed the District Court and granted vacation pay to the workers. The Court stated, at 446 Fed.2d 613:

> "When situations such as these have arisen in the past, they have almost uniformly been resolved in the unions favor."

The Court went on to elaborate on that statement with citations and analysis of cases. It is interesting to note that the Court's decision was based upon general contract law which provided that the occurrence of the event is eliminated as a condition if it prevented by the fault of the promissor. This is very similar to the Louisiana Civil Code Article cited earlier herein. See also *Schneider v. Electric Auto-Lite Company,* 456 Fed.2d 366 (6 Cir. 1972). In that case, the Court again recognized that the weight of federal law is on the side of the employee in this situation. It awarded vacation pay in a similar circumstance. It also held that the grievance procedure was not applicable.

Thus both the weight of federal law and state law is on the side of Respondents in this case.

CONCLUSION

In conclusion, it is respectfully submitted that the Petition for Writ of Certiorari filed by Petitioner, MANVILLE FOREST PRODUCTS CORPORATION, should be denied. The supposed errors in the decisions of the lower courts are unsupported and in fact the correct decision was made, regardless of whether state law or federal law is applied.

Respectfully submitted,

BRUSCATO, LOOMIS & STREET
ATTORNEYS AT LAW
P.O. BOX 2374
2011 HUDSON LANE
MONROE, LOUISIANA 71207
TELEPHONE: (318) 325-7577

BY: _____
C. DANIEL STREET
ATTORNEYS FOR RESPONDENTS

DATED: December _____, 1987.

CERTIFICATE OF SERVICE BY MAIL

I, C. Daniel Street, a member of the bar of the Supreme Court of the United States and Counsel of Record for Respondents herein, hereby certify that on December _____, 1987, pursuant to this Court's Rules, I served three (3) copies of the foregoing brief on the other party to this suit, Manville Forest Products Corporation, by depositing such copies in the United States Post Office, Monroe, Louisiana, with first class postage prepaid, properly addressed to Mr. C. A. Martin, III, Shotwell, Brown & Sperry, P.O. Box 1591, Monroe, Louisiana 71201.

All parties required to be served have been served.

_____

C. DANIEL STREET

DATED: December _____, 1987.

APPENDIX

LOUISIANA REVISED STATUTE 23:631-640

§ 631. Discharge or resignation of employees; payment within three days after termination of employment

A. Upon the discharge or resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, not later than three days following the date of discharge or resignation. Said payment shall be made at the place and in the manner which has been customary during the employment, except that payment may be made via United States mail to the laborer or other employee, provided postage has been prepaid and the envelope properly addressed with the employee's or laborer's current address as shown in the employer's records. In the event payment is made by mail the employer shall be deemed to have made such payment when it is mailed. The timeliness of the mailing may be shown by an official United States postmark or other official documentation from the United States Postal Service.

B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section.

C. With respect to interstate common carriers by rail, a legal holiday shall not be considered in computing the

three day period provided for in Subsection A of this Section.

Amended by Acts 1977, No. 317, § 1.

§ 632. Liability of employer for failure to pay; attorney fees

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

Amended by Acts 1964, No. 422, § 1; Acts 1977, No. 317, § 1.

§ 633. Payment twice monthly in certain occupations; penalty for violations

Every person, engaged in manufacturing of any kind, or engaged in boring for oil and in mining operations, employing as many as ten or more employees, and every public service corporation, shall be required to make full payment

to employees for services performed as often as once every two weeks or twice during each calendar month, which pay days shall be two weeks apart as near as is practicable, and such payment or settlement shall include all amounts due for labor or services performed up to not more than ten days previous to the time of payment, except that public service corporations shall not be required to make payment for labor or services performed up to more than fifteen days prior to the time of payment, provided that, except in cases of public service corporations, this Section shall not apply to the clerical force or to salesmen.

Whoever violates the provisions of this Section shall be fined not less than twenty-five dollars nor more than two hundred and fifth dollars, or imprisoned for not less than ten days, or both, for each offense and for each day's violation.

Amended by Acts 1954, No. 150, § 1.

§ 634. Contract forfeiting wages on discharge unlawful

No person, acting either for himself or as agent or otherwise, shall require any of his employees to sign contracts by which the employees shall forfeit their wages if discharged before the contract is completed or if the employees resign their employment before the contract is completed; but in all such cases the employees shall be entitled to the wages actually earned up to the time of their discharge or resignation.

§ 635. Assessment of fines against employees unlawful; exceptions

No person, acting either for himself or as agent or otherwise, shall assess any fines against his employees or deduct any sum as fines from their wages. This section shall not apply in cases where the employees wilfully or negligently damage goods or works, or in cases where the employees wilfully or negligently damage or break the property of the employer, but in such cases the fines shall not exceed the actual damage done.

§ 636. Penalty for violations

Whoever violates the provisions of R.S. 23:634 or R.S. 23:635, shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned for not less than thirty days nor more than three months.

§ 637. Non-resident plantation owners; suits against for wages, etc.; venue; service of citation

Mechanics, laborers and others doing work on plantations of non-resident proprietors may institute suit for recovery of their wages, labor, work or portion of the crop, as the case may be, against the non-resident proprietors of the plantations in the parish in which the labor or work was done and performed.

In all such cases it shall only be necessary to make service of the copy of citation and petition upon the agent, overseer, manager or other person having the control,

management, or administration of the plantation, and in the employ of the non-resident proprietor.

§ 638. Payment under retirement or other benefit plans; discharge of insurer, trustee or employee

A. Whenever payment or refund is made to any employee, former employee or his beneficiary or estate pursuant to a written retirement, death or other employee benefit plan or savings plan, such payment or refund shall fully discharge the employer and any trustee or insurance company making such payment or refund for all adverse claims thereto and from all liability for inheritance taxes due the state, unless, before such payment or refund is made, the employer or former employer, where the payment is made by the employer or former employer, has received at its principal place of business within this state, written notice by or on behalf of some other person that such other person claims to be entitled to such payment or refund or some part thereof or where a trustee or insurance company is making the payment, such notice has been delivered by the employer to the home office of such trustee or such insurance company or has otherwise been received by said parties. In the event the employee is deceased and a judgment of possession has been entered in his or her succession, payment of such money, or portions thereof, pursuant to the terms of the judgment of possession shall likewise fully protect the employer and any trustee or insurance company making such payment unless before such payment is made written notice of an adverse claim is received as provided herein.

B. Nothing contained in this Section shall affect any claim or right or inheritance tax to or on any such payment or refund or part thereof as between all pesons other than the employer and the trustee or insurance company making such payment or refund.

Added by Acts 1954, No. 367, § § 1, 2. Amended by Acts 1960, No. 58, § 1; Acts 1966, No. 274, § 1.

§ 639. Venue in suits for past wages

In addition to all other locations and courts in which such suit may be appropriate, workmen, laborers, clerks, and all other employees may sue their employers or hirers for any wages or salary due and owing in the district court of the parish where the work was performed.

Added by Acts 1960, No. 348, § 1.

§ 640. Fringe benefits payable under collective bargaining agreements

Any and all amounts payable by employers under collective bargaining agreements with any labor organization for vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, or any other fringe benefits considered as wages by the secretary of labor in determining prevailing wage rates shall be considered and treated as wages due by employers under R.S. 23:631 - 23:639 and employers shall be obligated to pay the said amounts to the trust funds, trustees, or other obligees to whom such payments shall be due and owing in the same manner and subject to the same penalties for

nonpayment and the same provisions as to collection and enforcement by the said obligees as apply to ordinary wages under R.S. 23:631 - 23:639.

Added by Acts 1966, No. 536, § 1.

Supreme Court, U.S.
FILED
DEC 22 1987
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CLERK

No. 87-513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MANVILLE FOREST PRODUCTS CORPORATION,
Petitioner,

vs.

MELVIN EVANS, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL SECOND CIRCUIT, STATE OF LOUISIANA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

C. A. Martin, III
(Counsel of Record)
SHOTWELL, BROWN & SPERRY
Seventh Floor, Ouachita
National Bank Building
Monroe, Louisiana 71210
Telephone: (318) 388-4700

Of Counsel:
Lawrence S. Falter
Assistant Corporate Counsel
MANVILLE CORPORATION
P.O. Box 5108
Denver, Colorado

Peyton Lacy, Jr.
LANGE, SIMPSON, ROBINSON & SOMERVILLE
1700 First Alabama Bank Bldg.
Birmingham, Alabama 35203
Attorneys for Petitioner

A-FAB PRINTING SERVICE ★ MONROE, LA ★ (318) 325-0470

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National Metalcrafters v. McNeil, 784 F.2d 817 (7th Cir. 1986) [1] 6

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[1] In the Petition for Writ of Certiorari, *National Metalcrafters* was incorrectly cited as having certiorari denied. In fact, no request for certiorari was made. A second *National Metalcrafters* case did have certiorari denied and was incorrectly cross-referenced by Shephards with the above case.

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SUMMARY OF ARGUMENT

The arguments raised by plaintiffs are inapposite and erroneous. Manville Forest Products Corporation (herein "MFPC") does not present or pursue an issue of constitutionality. Plaintiffs' citations relative to conflicting policies of federal laws are not precedential in this matter as they do not deal with preemption of state law by federal law. Plaintiffs' action is clearly a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (herein "Section 301"), since plaintiffs' complaint alleges vacation pay due under a labor agreement, and the Court of Appeal, Second Circuit, State of Louisiana (herein "the Louisiana Second Circuit") specifically referred to and interpreted the labor agreement. The Louisiana Second Circuit's finding that under the labor agreement the plaintiffs have "no right to vacation wages" is controlling in this matter.

Plaintiffs have presented no case or argument establishing that the doctrine of preemption is not applicable. The only ground for avoidance of preemption argued by plaintiffs is the contention that their action is not one for breach of a labor agreement. This contention is without merit.

ARGUMENT

I.
The Opposition Arguments by Plaintiffs are not Persuasive.

Plaintiff contends that the Petition for a Writ of Certiorari raises an issue of constitutionality. Although the "Supremacy Clause" of the United States Constitution [2] is the logical cornerstone of the doctrine of preemption, MFPC does not contend that *La. R.S.* 23:640 is unconstitutional. MFPC merely contends that its use by the Louisiana Second Circuit as the basis of vacation eligibility or entitlement here was erroneous because it was used as a substitute for the terms of a labor agreement which, under federal law, should be held to preempt state law.

MFPC has previously addressed plaintiffs' contention that *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) is controlling in this case. MFPC cites *Barrentine* at footnote four of its Petition for a Writ of Certiorari. Any "line of cases" referred to by plaintiffs under *Barrentine* deal with the issue of the applicability and validity of arbitration awards which purport to resolve issues of *federal* law. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Those cases are not similar to the case here and have no precedential value. They do not turn on preemption of state law by federal law, but merely resolve issues arising by virtue of conflicting doctrines of federal law.

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[2] United States Constitution, Article VI.

Plaintiffs' response to the preemption argument is to contend that they do not rely upon a breach of the labor agreement. Their complaint, however, alleges that "[u]nder the terms of the Collective Bargaining Agreement in force between Petitioner's Union ... and Defendant ... Petitioners are entitled to vacation pay from Defendant." (Petition for a Writ of Certiorari, p. A-26). [3] Further, the Louisiana Second Circuit held that "[i]n order to resolve the issues we have had to look at the nature of the right of the plaintiffs asserted and at the appropriate provisions of the agreement." The Louisiana Second Circuit went on to interpret the contract under principles of state law. The Louisiana Second Circuit specifically declined to utilize federal law developed under Section 301. The Louisiana Second Circuit did not apply the doctrine of federal preemption and in failing to do so it erred. Simply put, state law is not an independent source of private rights in suits brought "under the terms of [a] Collective Bargaining Agreement." See *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *Avco Corp. v. Aero Lodge, I.A.M. & A.W.,* 390 U.S. 557 (1968); *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Co.,* 369 U.S. 95 (1962); *Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957).

Plaintiffs' argument that federal case law requires the plaintiff-employees to be paid vacation pay is contrary to the specific, factual holding of the Louisiana Second Circuit that, under the plain meaning of the labor agreement, "no vacation pay is due." (Petition for a Writ of Certiorari,

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[3] References to the Appendix of the previously filed Petition for a Writ of Certiorari are made hereafter in this manner.

p. A-6). The court in *Local 186, United Packinghouse Workers v. Armour and Company,* 446 F.2d 610 (6th Cir. 1971), cited by plaintiffs as support for this argument, based its decision on the fact that the contract there was ambiguous because it did not set a definite "eligibility date." Here, the contract clearly provides, and the Louisiana Second Circuit held that only employees employed on January 1, are "entitled" to vacation. In *Schneider v. Electric Auto-Lite Company,* 456 F.2d 366 (6th Cir., 1972), also cited by plaintiffs, the clause was different from the one here and a *pro rata* share of vacation was found due. The court there specifically held, however, that "Wisconsin law is inapplicable." *Id.,* p. 371. That case, therefore, supports the argument of MFPC that state law contract interpretation is preempted by federal law in breach of labor agreement cases under Section 301.

II.

Certiorari is Appropriate for the Reasons Previously Advanced by MFPC.

Petitioner MFPC has asserted two theoretical bases for this Court's exercise of the discretionary Writ of Certiorari. First, the decision of the Louisiana Second Circuit not to apply preemption to this case is in derogation of the prior preemption decisions of this Court in the two following particulars: (1) it imposes state law principles of contract interpretation to the exclusion of the explicit terms of the labor agreement which are due to be interpreted under federal, not state, principles of contract interpretation;

and (2) it applies a state statute of limitations to a complaint alleging breach of a labor contract rather than the statute of limitations at 29 U.S.C. § 160(b) which has specifically been deemed applicable by this Court to actions such as the one here. Second, the decision is in direct contravention of a decision by the United States Court of Appeals for the Seventh Circuit intepreting a similar state statute and because of the nationwide prevalence of such state statutes, this Court's resolution of the conflict is necessary to eliminate the exising dichotomy of authority.

Plaintiff-employees have mounted no challenge in their brief to the reasons asserted by MFPC for granting the Writ of Certiorari. Neither does plaintiffs' brief defend the rationale upon which the decision of the Louisiana Second Circuit is based. Plaintiffs seek in their brief to vindicate the correctness of the decision of the Louisiana Second Circuit by application of various state and federal cases from lower courts on points not relied on by the Louisiana Second Circuit. Plaintiffs do not address the basic rationale of MFPC's petition which is that their state action is preempted by Section 301 under the decisions of this Court.

At least one argument by plaintiffs appears to enhance the grant of a Writ of Certiorari because it admits that a split of authority exists between the various United States Courts of Appeal in regard to the application of state statutory and common law to vacation pay claims arising under collective bargaining agreements. If the court in *Local 186, United Packinghouse Workers v. Armour and*

Company, id., in fact based its decision on state contract law,[4] as plaintiff appears to argue, that fact merely underscores that a split of authority exists on this issue which is one of the three specific grounds upon which a Writ of Certiorari is sought by MFPC.

In summary, plaintiffs show no reason why a Writ of Certiorari should not be granted. Clearly the Louisiana Second Circuit held that federal substantive law, developed in suits under Section 301, which would require the contract language to control, was not applicable. The Louisiana Second Circuit specifically held that "under the terms of Art. XVII of the Agreement, the plaintiffs have no right to vacation wages." (MFPC Petition for a Writ of Certiorari, p. A-6). The Louisiana Second Circuit held, however, that a "conflicting state law" controlled rather than the contract language and that the state statute of limitations was applicable rather than the federal limitations period required by *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983). The Louisiana Second Circuit decision ignores the principle of preemption and, contrary to the holding in *National Metalcrafters v. McNeil, id.,* subordinates federal law under Section 301 to the state statute at *La. R.S.* 23:640.

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[4] Plaintiffs' brief is ambiguous on the issue of whether or not this case turns on state contract law principles or federal "common law." A fair reading of the case would indicate that the court functioned as an arbitrator and applied "federal" contract interpretation criteria rather than state law. If, however, as plaintiffs contend, state law was applied to defeat vacation eligibility, the decision is contrary to the decision of the United States Court of Appeals for the Seventh Circuit in *National Metalcrafters v. McNeil,* 748 F.2d 817 (7th Cir. 1986).

CONCLUSION

For the reasons set forth above and previously in this matter, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

C. A. Martin, III
(Counsel of Record)
SHOTWELL, BROWN
& SPERRY
Seventh Floor, Ouachita
National Bank Building
Monroe, Louisiana 71210
Telephone: (318) 388-4700

Peyton Lacy, Jr.
LANGE, SIMPSON,
ROBINSON &
SOMERVILLE
1700 First Alabama Bank
Bldg.
Birmingham, Alabama 35203
Telephone: (205) 250-5036

Of Counsel:

Lawrence S. Falter
Assistant Corporate Counsel
MANVILLE CORPORATION
P.O. Box 5108
Denver, Colorado 80217-5108